Supreme Court, U.S.
FILED
JUL 18 2007
OFFICE OF THE CLERK

No. 07-76

IN THE

Supreme Court of the United States

JOHN HENRICHS; ANNE HENRICHS, PETITIONERS

v.

VALLEY VIEW DEVELOPMENT, A CALIFORNIA CORPORATION; FEDERAL DEPOSIT INSURANCE CORPORATION, A FEDERAL CORPORATION; TIMCOR EXCHANGE CORPORATION, DBA TIMCOR FINANCIAL CORPORATION; MARC GELMAN, AN INDIVIDUAL; MICHAEL BLAHA, AN INDIVIDUAL; GRANADA PLAZA ASSOCIATES LTD., A CALIFORNIA LIMITED PARTNERSHIP,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Epstein
Counsel of Record
Richard E. Blasco
F. Glenn Nichols
HUNT, ORTMANN, BLASCO, PALFFY & ROSSELL, INC.
301 N. Lake Avenue, 7th Floor
Pasadena, CA 91101-1807
(626) 440-5200

Attorneys for Petitioners

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

QUESTIONS PRESENTED

The questions presented below each involve a "claim" made by a property owner who acquired title to property, subject to the lien of a trust deed. The lien was acquired by a purchaser from the FDIC, in its capacity as receiver for a failed bank. The property owner was seeking a determination of rights with respect to the lien.

The primary questions each relate to the jurisdiction of any court of law, to determine the rights of the purchaser and the property owner with respect to the lien on the property. The questions also deal with the duties and the liability of the FDIC for damages, when a state court determines that the lien must be released by the purchaser, because of an act of the FDIC.

The questions presented are:

1. If a "claim" for reformation of an agreement entered into by the FDIC in its capacity as receiver cannot be reformed by any court in an action against the FDIC pursuant to 12 U.S.C. §1821(j), can the same agreement be reformed when the reformation claim is made after the asset is sold by the FDIC, and the FDIC is not a party to the reformation action?

2. Does 12 U.S.C. §1821(d)(13)(D) preclude any court from ever having initial jurisdiction to determine rights with respect to an asset of a depository institution for which the FDIC has been appointed receiver, which claim arises from conduct of the FDIC that occurred before such asset is sold to a purchaser, and, such claim is made against the purchaser and the asset?

3. Does 12 U.S.C. §1821(d)(3) require the FDIC to administer, adjudicate and pay a claim with respect to an asset of a depository institution for which the FDIC was appointed

receiver, which claim arises from conduct of the FDIC in the administration of the receivership estate, that occurred before such asset is sold to a purchaser, and, such "claim" is made against the purchaser and the asset?

4. Does 12 U.S.C. §1821(d) grant exclusive jurisdiction to federal courts to adjudicate an administrative claim against the FDIC, only after a claimant has exhausted its administrative remedies?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 30

APPENDIX

9th Circuit Court Opinion 1a
U.S. District Court Decision 15a
Order Denying Rehearing 32a
California Court of Appeal, 2nd Appellate District, Division Four Decision 34a
California Superior Court, LA County, North Valley District Decision 63a
California Superior Court, LA County Decision 66a
California Court of Appeal, 2nd Appellate District, Division Four Decision 82a
Declaration of Mary L. Riche 103a
Excerpts of FDIC 9th Circuit Brief 106a
Relevant Provisions Involved
12 U.S.C. §1821(d) 125a
12 U.S.C. §1821(e) 146a
12 U.S.C. §1821(g) 187a
12 U.S.C. §1821(h) 170a
12 U.S.C. §1821(i) 171a

12 U.S.C. §1821(j) 172a
12 U.S.C. §1821(n) 173a
12 U.S.C. §1823(e) 184a
5th Amendment 187a

TABLE OF AUTHORITIES

Page

CASES

ABELLERIA V. DISTRICT COURT OF APPEAL (1941) 17 CAL. 2D 280, 288 14

BAILARD V. MARDEN (1951) 36 CAL. 2D 703, 708 16

CADLE COMPANY V. 1007 JOINT VENTURE 82 F. 3RD 102, 105, (5TH CIR. 1996) 18

CALB V. FEUERSTEIN, 308 U.S. 433, 438 (1939) 26

LLOYD VS. FDIC, 22 F.3D 335 (1ST CIR. 1994), AT 336 17

MCCARTHY V. FDIC, 348 F.3D 1075, 1077 (9TH CIR. 2003) 15

NATIONAL LABOR RELATIONS BOARD V. WATERMAN STEAMSHIP CORP., 309 U.S. 206, 208-209 (1940) 24

NEWTON V. UNIVEST FINANCIAL CORP. 967 F. 2D 340, 347, (9TH CIR. 1992) 18

O'MELVENY & MEYERS V. FEDERAL DEPOSIT INSURANCE CORPORATION, 512 U.S. 79 84-85 (1994) 12

PORRAS V. PETRO PLEX SAVINGS ASSOCIATION (5TH CIR., 1990) 903 F. 2D 379, 381 19

PROFESSIONAL COLLECTION CONSULTANTS V. HANADA, 53 CAL. APP. 4TH 1016, 1019-1020 (1997) 19

SHARPE V. FDIC, 126 F. 3D 1147, 1154 (9TH CIR. 1997) 16

STOLL V. GOTTLIEB (1938) 305 U.S. 165, 171 14

TELEMETRICS INT'L, INC. V, NEMLC LEASING CORP., 967 F. 2D 703, 707 (1ST CIR. 1992) 17

UNITED STATES V. GENERAL MOTORS CORP., 323 U.S. 373, 378 25

UNITED STATES V. RUMELY, 345 U.S. 41, 45 (1953) 25

VOLGES V. RTC, 32 F.3D 50, 53 (2D AR. 1994), CERT. DENIED, 132 L. ED. 2D 860, 115 S. CT. 2618 (1995) 27

WATERVIEW MANAGEMENT COMPANY V. FDIC, 105 F.3D 696, 701 (D.C. CIR. 1997) 25

STATUTES

12 U.S.C. 1823(e) 3
12 U.S.C. § 1821(b)(6) 3
12 U.S.C. § 1821(d)(13)(D) 17, 19
12 U.S.C. § 1821(d)(3) 2
12 U.S.C. § 1821(d)(6) 11
12 U.S.C. § 1821(j) 11, 17
12 U.S.C. § 1823(e) 8
12 U.S.C. §1821(d)(13)(C) 15
12 U.S.C. §1821(d)(13)(D) 13, 21
12 U.S.C. §1821(d)(20) 21, 22, 25
12 U.S.C. §1821(d)(5) 3
12 U.S.C. §1821(d)(6) 18
12 U.S.C. §1821(j) 16
12 U.S.C. §1823(e) 8, 9, 12
28 U.S.C. §1254(1) 1

RULES

Supreme Court Rule 16.1 30

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court as reported at 474 F.3d 609, filed January 16, 2007, and is set forth in the Appendix, Exhibit 1a.

The Opinion of the United States District Court, Central District of California, filed August 13, 2004, was not reported and is set forth in Appendix, Exhibit 2a.

The Petitioners' Request for Reconsideration was denied on April 19, 2007, was not reported, and is set forth in the Appendix, Exhibit 3a.

The Opinion of the California Court of Appeals, Second District, Division 3, filed January 27, 2004, was not reported, and is set froth in the Appendix, Exhibit 4a.

The Judgment and Statement of Decision of the Superior Court of the State of California, Los Angeles County filed January 22, 2003, was not reported, and is set forth in the Appendix, Exhibit 5a.

The Opinion of the California Court of Appeals, Second District, Division 3, filed August 17, 2000, was not reported, and is set forth in the Appendix, Exhibit 6a.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on January 16, 2007. The Petitioners Request for Reconsideration was denied on April 19, 2007. This Petition for certiorari was timely filed, and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

I. **Introduction.**

Plaintiffs John and Anne Henrichs ("Henrichs") are assignees of the FDIC, of a note ("Capital Note") and trust deed ("Capital Trust Deed") originated by a failed financial institution ("Capital Bank"). The Henrichs requested the District Court to, among other things to vacate the judgment of the Superior Court for the County of Los Angeles, State of California, which erred when it concluded that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), and in particular 12 U.S.C. § 1821(d)(3), § 1821(d)(13)(D), §1821(j) and § 1823(e), was not applicable, and therefore, the Superior Court had subject matter jurisdiction to determine a post appointment "claim" against the FDIC for reformation of a settlement agreement entered into by the FDIC and the borrower/guarantors, almost two and a half years **after** the FDIC was appointed receiver of the failed depository institution.

Valley View's post appointment "claim" against the FDIC arose on November 16, 1995, and involved one parcel of collateral secured by the Capital Trust Deed ("Balboa Lien"). Valley View waited for the Capital Note and Capital Trust Deed to be sold by the FDIC to the Henrichs, and then sought to enforce its claim against the FDIC, in the Superior Court, against the Henrichs, the new owners of the Capital Trust Deed.

The state courts failed to recognize that the reformation of the FDIC Settlement Agreement in 2004, created an obligation on the part of the FDIC to reconvey the Balboa Lien, an asset to which the FDIC no longer held title[1]. With unlimited jurisdiction, the Superior Court, which had refused to allow the Henrichs to file a cross-complaint against the FDIC, ordered the Henrichs to reconvey the Balboa Lien, which was collateral for the balance due on the Capital Note.

The District Court, contrary to the Superior Court judgment, concluded without a trial, that the "lien on the

---

[1] The title to the Balboa Lien had been conveyed by the FDIC-R to the Henrichs, on November 16, 1995.

Balboa Lot was not an asset of the FDIC" when it was appointed receiver, and therefore "the grant of exclusive federal jurisdiction under 12 U.S.C. § 1821(b)(6) does not apply." The District Court relied upon inadmissible evidence that "the parties [which included Capital Bank] intended for the Capital Note and Trust Deed to encumber only the Chatsworth Lot."

This conclusion as to the "parties intent", was based upon extrinsic evidence that did not satisfy the requirements of §12 U.S.C. 1823(e). The evidence that did satisfy the requirements of §1823(e) was a subordination agreement, signed by Capital Bank, which expressly subordinated Valley View's ground lease, to the lien of the Capital Trust Deed.

The District Court then found that it was precluded from reviewing the Superior Court judgment, by application of the Rooker Feldman Doctrine.

The Ninth Circuit Court of Appeals subsequently affirmed the judgment of the District Court. However, the Ninth Circuit concluded that the Balboa Lien **was an asset of Capital Bank** when the FDIC was appointed receiver on June 18, 1993. The Ninth Circuit, however, concluded that "because the FDIC was not a party to the state court litigation", FIRREA did not apply[2].

Upon the Superior Court judgment becoming final, the Henrichs filed a "claim" with the FDIC pursuant to 12 U.S.C. §1821(d)(5). The FDIC did not approve or disapprove of the Henrichs "claim"[3]. The FDIC takes the position that the

---

[2] So if the Superior Court would have granted the Henrichs' motion for permission to file an amended cross-complaint which included the FDIC as a party, FIRREA would apply?

[3] Remember, because the FDIC no longer had title to the Balboa Lien, because it had sold and conveyed the Balboa Lien to the Henrichs on November 16, 1995, after the Superior Court informed the FDIC Settlement Agreement, ordering the FDIC to reconvey the Balboa Lien would not have cleared title to the Balboa Lot, which was the good of Valley View. That way the Superior Court ordered the Henrichs to do, what the Superior Court

(footnote continued)

receivership for Capital Bank was terminated, there are no assets left in the receivership estate, and therefore the "claim" is moot. Therefore, the FDIC had no duty to administer, adjudicate or pay the Henrichs administrative claim against the FDIC.

II. Factual Background.

A. *The Construction Loan.*

On December 31, 1990, the borrower, Granada Plaza Associates, ("GPA") obtained a construction loan for $3,985,000 from Capital Bank to finance construction of condominiums. To secure the construction loan, Capital Bank requested, and the borrower executed, the Capital Trust Deed, which **created a lien against the lot ("Chatsworth Lot") where the condominiums would be constructed, and the commercial lot referred to as the "Balboa Lot".**[4]

On January 14, 1992, the borrower, by grant deed recorded on January 15, 1992, conveyed the Balboa Lot to Valley View, subject to the lien of the Capital Trust Deed. No release (i.e., reconveyance) of the Balboa Lien was ever executed by Capital Bank. No written document was ever executed by Capital Bank providing for a release of the Balboa Lien, other than upon full payment of all obligations to Capital Bank by the borrower.[5]

B. *Appointment Of Receiver.*

On June 18, 1993, the FDIC ("FDIC-R") was appointed receiver of Capital Bank by the FDIC ("FDIC-C"),[6] and

---

had determined the FDIC should have done on or before November 16, 1995, which was to reconvey the Balboa Lien.

[4] Ex. 1a, p. 4a and Ex. 2a, p. 16a-17a.

[5] Ex. 2a, p. 17a -18a.

[6] Ex. 7a, p. 103a -104a.

acquired the Capital Note and the Capital Trust Deed. On August 1, 1993, the Capital Note became due and payable in full. The Capital Note was not paid, and became a nonperforming loan held by the FDIC-R.[7]

C. *Sale Of Capital Note And Capital Trust Deed.*

In November 16, 1995, the FDIC-R sold the Capital Note and Capital Trust Deed, in consideration for the payment of $300,000.00. This agreement was reflect in the FDIC Settlement Agreement which was executed by the FDIC, the borrower and the guarantors[8]. The FDIC Settlement Agreement, provided for a payment of $300,000.00 to the FDIC, the cancellation of the guarantees, a general release of any claims which the FDIC, borrower or guarantors had against each other, and indemnification of the FDIC-R if anyone ever challenged the terms of the FDIC Settlement Agreement.[9]

Upon receipt of payment[10], the FDIC executed a document of conveyance assigning the Capital Note and Trust Deed to three purchasers, which included the Henrichs.[11]

The FDIC represented to the Henrichs that the balance due on the Capital Note as of November 17, 1995, was $810,382.24. As of November 17, 1995, there were eleven (11) parcels of real property remaining as collateral for the repayment of the balance due on the Capital Note, upon which liens existed by the recording of the Capital Trust Deed.[12]

---

[7] Ex. 1a, p. 5a; Ex. 2a, p. 18a; and Ex. 8a, p. 108a.

[8] Valley View was not a party to the FDIC Settlement Agreement, though its president and owner, as a guarantor of the Capital Note, was a party.

[9] Ex. 1a, p. 5a; Ex. 2a, p. 18a; and Ex. 4a, p. 43a.

[10] After various settlements by Valley View and the other two owners of the Capital Note, the Henrichs were the sole owners of the Capital Note and Trust Deed.

[11] Ex. 2a, p. 18a and Ex. 4a, p. 43a.

[12] Ex. 4a, p. 43a.

D. *The Balboa Lot*

In January 1996, two months after the FDIC Settlement Agreement was executed, Valley View demanded that the Henrichs reconvey the Balboa Lien. Valley View did not demand that the Henrichs reconvey the liens on any of the other ten (10) parcels (i.e. the remaining condominium units) that secured repayment of the Capital Note. The Henrichs refused to do so, and in April 1998, the Henrichs commenced foreclosure proceedings on the unsold parcels, to recover the balance due on the Capital Note.[13]

On August 6, 1998, Valley View filed an action in the Los Angeles Superior Court, Case No. PC019940Y, and obtained a preliminary injunction staying the foreclosure of the Balboa Lot, pending resolution of Valley View's "claims". The Henrichs proceeded to foreclose on the unsold condominium units.[14] After completion of the foreclosure of the unsold condominium units, and appropriate credits made to the balance due on the Capital Note, as of December 2, 1998, there remained due and owing on the Capital Note the sum of $468,798.89.

E. *First State Court Proceedings And Appeal.*

In the initial proceedings ("Henrichs I"), Valley View asserted that the FDIC Settlement Agreement, as written, contained a provision requiring the FDIC-R to release the Balboa Lien. Valley View moved for summary adjudication of this issue, and the Superior Court agreed with Valley View, finding that the Henrichs had no enforceable security interest in the Balboa Lot. After trial of other issues, a judgment was entered by the Superior Court to the effect that Valley View

---

[13] Ex. 1a, p. 5a and Ex. 4a, p. 43a – 44a.

[14] Ex. 1a, p. 5a – 6a and Ex. 2a, p. 18a – 19a.

was the sole owner of the Balboa Lot, and the Henrichs had no right or interest arising out of the Balboa Lien.[15]

The Henrichs filed an appeal, and the California Court of Appeal, in its opinion filed August 17, 2001[16], held that the FDIC Settlement Agreement did not extinguish the Capital Note by satisfaction, but instead assigned to the Henrichs, the FDIC's interest in the Capital Note and Trust Deed, **which included the Balboa Lien**. Inferred in this ruling is that the FDIC Settlement Agreement did not evidence an intent by the FDIC to reconvey the Balboa Lien. Accordingly, the Court of Appeal reversed the judgment quieting title to the Balboa Lot in Valley View, and remanded the matter for further proceedings.[17]

F. *Second State Court Proceedings and Appeal.*

Upon remand ("Henrichs II"), Valley View requested leave to file a Verified Second Amended Complaint, seeking to reform the FDIC Settlement Agreement. Over the objection of the Henrichs, the Superior Court permitted Valley View to file its amended complaint. In its reformation cause of action, Valley View alleged that the FDIC Settlement Agreement, as written, did not represent the "true" intent of the parties, in that it did not contain a provision evidencing the agreement of the FDIC-R, to reconvey the Balboa Lien upon its receipt of the $300,000.[18]

Valley View asserted that the failure of the FDIC Settlement Agreement to reflect the "true" intent of the parties, resulted from a mutual mistake of the FDIC, the borrower and the guarantors. However, Valley View did not name the FDIC as a defendant in its action.[19] Upon objection by the Henrichs

---

[15] Ex. 1a, p. 5a – 6a and Ex. 4a, p. 44a -45a.
[16] Ex. 6a.
[17] Ex. 4a, p. 45a and Ex. 6a, p. 98a.
[18] Ex. 4a, p. 45a – 46a.
[19] Ex. 4a, p. 45a – 46a.

to the failure of Valley View to include the FDIC as a party to the action, the Superior Court ruled that the FDIC was not an indispensable party to the action to reform the FDIC Settlement Agreement, and allowed Valley View to proceed. The Superior Court refused to allow the Henrichs to bring the FDIC in as a cross-defendant.[20]

After the Henrichs' initial challenges during the pleading stage as to the ability of Valley View to reform the FDIC Settlement Agreement without the FDIC being a party to the action, and the Henrichs' assertion that 12 U.S.C. §1823(e) precluded the consideration of any evidence not satisfying the statute's requirements, the parties filed cross motions for summary adjudication. The Superior Court again ruled in favor of Valley View, finding that there was a triable issue of fact as to whether or not the FDIC Settlement Agreement should be reformed.[21] The Superior Court also concluded in its ruling that 12 U.S.C. § 1823(e) had no application to this case, and it therefore could consider extrinsic evidence that did not satisfy the requirements of § 1823(e). Ex. 5a, p. 79a.

Ultimately, a trial occurred, after which the Superior Court entered judgment in favor of Valley View, finding that: "The FDIC Settlement Agreement and inclusive release, together with the Attornment Agreement, served as the satisfaction of the note obligation as far as the Balboa parcel and its fee owner, Valley View, is concerned[22]."

The Superior Court declared Valley View to be the rightful owner of the Balboa Lot, free and clear of the Balboa Lien. It ordered that "**the FDIC and/or its successor and assignees** shall execute a reconveyance formally removing the

---

[20] Ex. 4a, p. 54a.
[21] Ex. 4a, p. 47a.
[22] Ex. 5a.

lien against title[23]." The Superior Court again expressly found that "1823 has no application to this case."[24]

The Henrichs again appealed the decision of the Superior Court to the Court of Appeal[25]. The Court of Appeal affirmed the decision of the Superior Court, and stated in its Opinion that:

> "At the time it entered into the construction loan contract with GPA, Capital Bank had actual notice of the ground lease between GPA and Valley View, and indeed was a party to the subordination agreement which recognized the existence of the ground lease. In agreeing to make the construction loan to GPA, **it was no secret to Capital Bank** that GPA and Valley View had agreed the Balboa lot would be reconveyed to Valley View free and clear of any liens or encumbrances as soon as the lot was subdivided and a tract map recorded. Bank and its successor, the FDIC, thus were never led to believe that the Balboa lot would remain part of the security for the construction loan. The D'Oench Duhme[26] doctrine simply has no application here and cannot form the basis for barring reformation of the FDIC settlement agreement." [Emphasis added.][27]

---

[23] Obviously, contrary to the finding of the District Court, the Superior Court recognized that the Balboa Lien was acquired by the FDIC when it was appointed receiver, which is why the Superior Court ordered the "FDIC and/or its successors and assigns" to execute a reconveyance removing the lien, based upon the reformed FDIC Settlement Agreement.

[24] Ex. 4a, p. 49a and Ex. 5a, p. 64a – 65a.

[25] While the appeal was pending, the Balboa Lot was sold pursuant to an agreement between Valley View and the Henrichs. The net proceeds from the sale in the approximate amount of $460,000, were deposited with Timcor, subject to final resolution of title thereto.

[26] 12 U.S.C. §1823(e).

[27] Ex. 4a, p. 58a.

G. *Federal District Court.*

On March 31, 2004, the Henrichs filed an administrative claim with the FDIC, seeking damages for the FDIC-R's breach of the Assignment Agreement.[28] On June 14, 2004, the Henrichs filed this action in the District Court, seeking to void the Superior Court judgment, or in the alternative seeking damages from the FDIC for breach of contract, for indemnification by the borrower/guarantors as provided for in the FDIC Settlement Agreement, and, for an injunction prohibiting Timcor from distributing to Valley View the $460,000 realized from the sale of the Balboa Lot.[29]

The Henrichs initially sought from the District Court a temporary restraining order, to restrain Timcor and/or Valley View from "releasing, disbursing, expending or otherwise disposing of the proceeds . . . from the sale of the property located at 10688 Balboa Boulevard, Chatsworth, California." The Henrichs application for a temporary restraining order was denied by the District Court on June 16, 2004, at which time the Court set a hearing on the Henrichs' application for a preliminary injunction. Pursuant to the District Court's order, the hearing would also include consideration of the threshold issue of "whether the Court in fact has subject matter jurisdiction over this action . . .". The District Court believed that it was precluded from vacating the final state court judgment.[30]

On July 26, 2004, the hearing was held, and an "Order Dismissing Action for Lack of Subject Matter Jurisdiction" was entered on August 17, 2004[31]. The order concluded:

> "Therefore, the asset acquired by the FDIC from Capital Bank was the Capital Note and Trust Deed secured only

---

[28] Ex. 8a, p. 110a.
[29] Ex. 1a, p. 6a and Ex. 2a, p. 15a – 16a.
[30] Ex. 1a, p. 6a – 7a and Ex. 2a, p. 16a.
[31] Ex. 2a.

by the Chatsworth Lot. As such, the Balboa Lot was not an asset of the FDIC and the grant of exclusive federal jurisdiction under 12 U.S.C. § 1821(d)(6) does not apply to claims concerning the Balboa Lot. As such, the Superior Court did not exceed its jurisdiction in adjudicating Valley View's claims.

Further, the Superior Court did not exceed its jurisdiction in ordering the reformation of the FDIC Settlement Agreement. The Superior Court did not order the FDIC to reconvey the Capital Note and Trust Deed in alleged violation of 12 U.S.C. § 1821(j), but rather issued injunctive relief only as against the Henrichs. As such, the Superior Court's order was within its jurisdiction[32] [33]. [Emphasis added]

REASONS FOR GRANTING THE PETITION

I. Issues Important to Analysis.

It is important to note at the outset of the legal analysis that follows, that Valley View has never made any claim against the Henrichs, based upon any act or omission of the Henrichs that occurred before, or after, the sale of the Capital Note and the Capital Trust Deed to the Henrichs, except for the act of commencing a foreclosure upon its collateral, which collateral included the Balboa Lien. All "claims" by Valley View with respect to the Balboa Lien arose out of (i) acts or omissions by Capital Bank (i.e., the alleged failure of Capital Bank, pursuant to a secret agreement with the borrower and Valley View, to release the lien on the Balboa Lot upon the

---

[32] So if the FDIC-R had not sold the Capital Note and Trust Deed, which included the Balboa Lien, to the Henrichs, the Superior Court could not have reformed the FDIC Settlement Agreement, and ordered the FDIC to reconvey the Balboa Lien.

[33] Ex. 2a, p. 28a.

recording of the final subdivision map; and (ii) acts or omissions of the FDIC-R (i.e., the alleged failure of the FDIC-R, pursuant to a secret agreement between the borrower, guarantors and the FDIC-R, to release the Balboa Lien as part of the FDIC's settlement with the borrower and guarantors[34].)

In understanding FIRREA, and the legal analysis that follows, it is important that certain concepts are understood.

The "asset" acquired by the FDIC-R is not the real property (i.e., the Balboa Lot), but is the lien created by the recording of the Capital Trust Deed (i.e., the Balboa Lien), on the Balboa Lot.

A determination of the rights with respect to the Balboa Lien, not the rights with respect to the Balboa Property, are governed by FIRREA, once the Balboa Lien becomes an asset of the FDIC-R.

California real property law governs the rights with respect to the Balboa Lot and the Balboa Lien, except when California real property law conflicts with the provisions of FIRREA[35].

Once the FDIC was appointed receiver of Capital Bank, any "claim" with respect to the Balboa Lien, which arose out of the acts of Capital Bank or the FDIC, and which occurred before the sale of the Balboa Lien to the Henrichs, is subject to FIRREA, and the administrative claims process.

An asset is sold by the FDIC-R, free and clear of any liens or claims that do not satisfy the requirements of 12 U.S.C. §1823(e).

"No court shall have jurisdiction over (i) any claim or action for payment from, or any action seeking a determination of rights which respect to, the assets of any depository institution for which the Corporation [FDIC-R] has been appointed receiver,... or (ii) any claim relating to any act or

---

[34] Note that Valley View as not a party to the FDIC Settlement Agreement.
[35] O'Melveny & Meyers v. Federal Deposit Insurance Corporation, 512 U.S. 79 84-85 (1994).

omission of such institution or the Corporation [FDIC-R] as receiver[36].

The Henrichs believe that any "claim" with respect to the Balboa Lien is subject to FIRREA, which includes (i) an administrative claims process, and (ii) the jurisdictional bar, even after the Balboa Lien is sold to a private party. Such special FIRREA status of the Balboa Lien continues until such time as the Balboa Lien is extinguished by payment in full of the obligation which it secures, or is otherwise released by its owner.

In this case, the appointment of the FDIC-R as receiver for Capital Bank, commenced the time for Valley View to file its claims with the FDIC-R. This would include all claims against Capital Bank, claims against the assets of the FDIC-R receivership estate, and claims against the FDIC-R for acts or omissions of the receiver in the administration of the receivership estate. However, Valley View failed to file any claim with the FDIC-R, for Capital Bank's breach of its alleged oral (i.e., secret) agreement to release the Balboa Lien on the recording of the final subdivision map. It also failed to file a "claim" with the FDIC-R, once it discovered that the FDIC-R had breached the alleged provision in the FDIC Settlement Agreement to release the Balboa Lien.

Instead of following the proper administrative claims procedure established by Congress, Valley View filed its "claims" as actions in the Superior Court. This is similar to a "claimant" in a bankruptcy case ignoring the statutory claims procedure, waiting for the assets of the estate of the debtor to be liquidated, and then filing a state court action against the purchaser of the asset. It is also similar to a claimant in a probate case, not filing its "claim" with the executor of the decedent's estate, but waiting for the assets to be distributed or sold by the executor, and then commencing an action against the heir or purchaser of the asset.

---

[36] 12 U.S.C. §1821(d)(13)(D)

II. The State Courts Lacked Subject Matter Jurisdiction Over Valley View's Claims.

A. *A Court Has No Jurisdiction Beyond That Defined By Statute Or Constitutional Provision.*

A court has no jurisdiction to hear or determine a case where the type of proceeding is beyond the jurisdiction defined for that particular court by statute or constitutional provision[37]. As recognized by this Court, there is a plain usurpation of power, when the court wrongfully extends its jurisdiction beyond the scope of its authority[38].

As was acknowledged by the District Court, if the Balboa Lien was acquired by the FDIC, reformation of the FDIC Settlement Agreement by the Superior Court would be expressly precluded by FIRREA[39]. This is because FIRREA prohibits equitable remedies against the FDIC0R, and §1821(d)(13)(D) prohibits judicial actions that "effect" the FDIC-R. Yet both lower federal courts sanctioned the Superior Court's proceeding to wrongfully extend its subject matter jurisdiction, to determine rights with respect to an asset that had been sold to a private purchaser.

B. *No Court Has Jurisdiction To Consider Any Of Valley View's Claims.*

Congress made it clear in Section 1821(d)(13)(D)(ii) that: "Except as otherwise provided in this subsection [i.e. (d)(3), (5) and (6)] no Court shall have jurisdiction over -- (ii) any claim relating to any act or omission of such institution [i.e. Capital Bank] or the Corporation as receiver [i.e. FDIC]." [Emphasis added.] The Ninth Circuit itself has recognized, **when the FDIC is a party**, that: "The text of §

---

[37] *Abelleria v. District Court of Appeal* (1941) 17 Cal. 2d 280, 288.
[38] *Stoll v. Gottlieb* (1938) 305 U.S. 165, 171.
[39] 12 U.S.C. §1821(j).

1821(d)(13)(D) plainly states that any claim or action that asserts a right to assets of a failed institution is subject to exhaustion[40]."

However, what appears to be clear when the FDIC-R is in possession of an asset seems to become muddled when the FDIC-R sells the asset. Sections 1821(d)(13)(D)(i) expressly and unambiguously provides that no court shall have jurisdiction over a "claim or action" seeking a determination of rights with respect to an asset acquired by the FDIC-R. If this isn't enough, §1821(d)(13)(D)(ii) expressly and unambiguously provides that no court shall have jurisdiction over any "claim" based upon an "omission" of the FDIC. The language of these two provisions, doesn't limit their application to the time when the FDIC has possession of an asset, or to the time **before** a receivership estate is terminated.

C. *The Jurisdictional Bar Is Not Limited to Claims Against the FDIC-R.*

When Congress intended for a right (i.e., benefit) to only the FDIC-R, and not to its assignees (i.e., purchasers) it expressly limited the benefit to the FDIC-R. By way of example, in 12 U.S.C. §1821(d)(13)(C), the provision that immediately precedes the jurisdictional bar set forth in §1821(d)(13)(D), Congress eliminated two provisional remedies against the FDIC-R, by providing: "No attachment or execution may issue by any court **upon assets in the possession of the receiver**."

If Congress had intended to limit the jurisdictional bar in §1821(d)(13)(D)(i) or (ii), it would have added the phrase "in the possession of the receiver" to §1821(d)(13)(D). Alternatively, Congress could have added the "in the possession of the receiver" condition to the introduction to §1821(d)(13),

---

[40] *McCarthy v. FDIC*, 348 F.3d 1075, 1077 (9th Cir. 2003).

making it applicable to the subject matter addressed in subparagraphs (A) through (D). However, Congress did not elect to restrict the provisions provided for in paragraphs (A), (B) and (D), to the period of time that the FDIC-R was in possession of the particular asset. It only limited the prohibition on "attachment or execution," to a claimant seeking such a provisional remedy against the asset, when the FDIC was in possession of the asset.

D. *No Court, Either State Or Federal, May Grant Equitable Relief Against The FDIC.*

Under California law, reformation is an equitable remedy used to reframe a written instrument to express accurately the parties' true agreement when, through fraud, mutual mistake, or unilateral mistake in limited circumstances, the writing does not embody their agreement[41]. In *O' Melveny* this Court held that there is no federal common, that state law controls unless expressly superseded by FIRREA.

As part of the extensive framework established when Congress enacted FIRREA, it eliminated any "claim" seeking equitable remedies from those available to a claimant after the FDIC was appointed receiver of a failed financial institution. Congress provided in 12 U.S.C. §1821(j) that: "Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver."

As recognized by the Ninth Circuit "Section 1821(j) prevents courts from granting any equitable relief against the FDIC, ..." [Emphasis added.][42] With respect to reformation, the First Circuit held:

---

[41] *Bailard v. Marden* (1951) 36 Cal. 2d 703, 708.

[42] *Sharpe v. FDIC*, 126 F. 3d 1147, 1154 (9th Cir. 1997).

"A 'district court lacks jurisdiction to enjoin the FDIC when the FDIC is acting pursuant to its statutory powers as receiver.' Telemetrics Int'l, Inc. v, NEMLC Leasing Corp., 967 F. 2d 703, 707 (1st Cir. 1992); see also 12 U.S.C. § 1821(j). . .

Thus, the district court was without jurisdiction to grant the injunctive relief appellant seeks. [citations]

* * *

Appellant's claims for equitable reformation and/or cancellation of the contract fare no better. These claims lie in the maw of the statute, for, in the statutory parlance, the plaintiff's complaint 'seeks a determination of rights with respect to [] the assets of [ ] depository institution for which the Corporation has been appointed receiver.' 12 U.S.C. § 1821(d)(13)(D)." (Emphasis added.)"[43]

In this action, Valley View's claim sought to reform the FDIC Settlement Agreement, a remedy that is expressly precluded by FIRREA, if sought against the FDIC. The issue in this case is not whether the remedy of reformation is barred if such "claim" is asserted against the FDIC-R, but is the remedy of reformation of an agreement entered into by the FDIC barred when it is asserted against the purchaser of assets from the FDIC-R?

E. *No Court Has Jurisdiction Until The Claimant Exhausts Its Administrative Remedies.*

In addition to the elimination of the jurisdiction of any courts, either state or federal, to reform an agreement entered into by the FDIC, the jurisdiction of any courts, both state and

---

[43] *Lloyd vs. FDIC*, 22 F.3d 335 (1st Cir. 1994), at 336 and 337.

federal, over "any claim against a depository institution" that "is filed with the Corporation as receiver", requires the claimant to exhaust its administrative remedies[44], before the federal courts will have jurisdiction to consider any such claim[45]. However, no such provision for the exhaustion of claims against the FDIC-R, for its acts or omissions, is provided for in Section 1821(d).

This gap in FIRREA, cannot be resolved by California law, but should be resolved by this Court. The Ninth Circuit, as well as the FDIC's resolution of this problem, by recognizing state court subject matter jurisdiction to determine rights with respect to assets purchased from the FDIC-R, or to resolve claims against the FDIC-R for its acts and omissions in administrating the receivership estate, was never intended by Congress.

III. STABILIZATION OF VALUE OF ASSETS.

In adopting FIRREA, Congress intended to stabilize the value of assets of failed banks, by limiting the remedies and defenses a claimant such as Valley View could assert against the failed bank, the FDIC, the purchaser of such assets, or the assets themselves, to avoid exactly the type of situation presented by this case. The benefits to the purchaser of assets from the FDIC-R created by FIRREA, apply to all "claims," including claims arising after the asset has been transferred (i.e. sold) by the FDIC[46]. An "assignee of the FDIC stands in the shoes of the FDIC," and thus receives the benefit of all of the defenses, exclusion of remedies and other federal benefits provided by FIRREA[47].

---

[44] It should be noted that a failure of the FDIC to respond to a "claim" within the statutory period, is equivalent to exhaustion.

[45] 12 U.S.C. §1821(d)(6).

[46] *Newton v. Univest Financial Corp.* 967 F. 2d 340, 347, (9th Cir. 1992).

[47] *Cadle Company v. 1007 Joint Venture* 82 F. 3rd 102, 105, (5th Cir. 1996).

"The FDIC can only make full use of the market in discharging its statutory responsibility if the market purchasers have the same rights . . . as does the FDIC".[48] "Although the plain language confers the benefit to the FDIC, it does not prohibit the FDIC from assigning that benefit." Id. "To hold otherwise, would impair the federal policy considerations expressed above." Id.

The federal courts have recognized the economic benefit to the FDIC of the "secret agreement defense" provided by §1823(e), does not disappear when an asset is transferred by the FDIC-R to a purchaser. Nor should the requirement to exhaust administrative remedies, and the judicial bar with respect to claims against the failed bank, the FDIC-R, or the asset, provided for in §1821(d)(13)(D), disappear when an asset is transferred by the FDIC-R to a purchaser. There is no economic sense to a rule that would permit a claim or action that is barred if asserted against the FDIC, to be resurrected against the FDIC's assignee. Yet this is now the rule in the Ninth Circuit.

Why would an assignee pay more for an asset acquired from the FDIC-R, if the benefits created by Congress which enhance the value and stabilize the market for such an asset, could only be asserted by the FDIC, and not by the FDIC's assignee? As stated in *Porras v. Petro Plex Savings Association* (5th Cir., 1990) 903 F. 2d 379, 381: "Claims and defenses barred as to the FSLIC by the O'Dench Duhme Doctrine are similarly barred as to private parties who purchased the assets of the failed institution from the FSLIC." (Emphasis added.)

As a result of the Superior Court's lack of subject matter jurisdiction, the judgment entered by the Superior Court is void for lack of subject matter jurisdiction, and should have been vacated by the District Court.

---

[48] *Professional Collection Consultants v. Hanada*, 53 Cal. App. 4th 1016, 1019-1020 (1997).

IV. Recovery Of Damages On An "Administrative Claim" For Breach Of Contract Is Not Limited To the Assets Of The Failed Bank.

A. *The Henrichs Administrative Claim Is Not Moot.*

In this action, the Henrichs presented four claims to the District Court for resolution. Three of the claims were entitled Independent Action to Void Judgment, Indemnity and Injunction (collectively the "Void Judgment Claims"). The Henrichs' success on all of these claims was based upon the Superior Court judgment being found void by the District Court. However, the Henrichs also had a Breach of Contract "claim" against the FDIC, **that was based upon the Superior Court judgment not being void**.

The District Court did not address the Henrichs' claim for Breach of Contract against the FDIC, yet it dismissed the entire action. However, the Henrichs do not believe that there existed any jurisdictional issue with respect to the Breach of Contract "claim" against the FDIC, even if the District Court were to dismiss the three Void Judgment Claims.

The Ninth Circuit in the Henrichs Opinion, at p. 608, held that:

> "Henrichs' must have suffered some actual injury that can be redressed by a favorable judicial decision. [citation] Henrichs may look only to the assets of the Capital Bank receivership to satisfy any breach of contract claims. [citations] The receivership distributed all of the failed bank's assets and was terminated in January 2001, fully three years before Henrichs raised the claim. No assets remain in the receivership to satisfy a late-filed claim, thus rendering the claim moot [citation]."

These holdings are contrary to FIRREA. Congress expressly provided in FIRREA that:

> "Notwithstanding any other provision of this subsection, any...judgment for monetary damages entered against a receiver...shall be paid as an administrative expense of the receiver...."12 U.S.C. §1821(d)(20).

However, FIRREA provides that: "any...administrative expenses of the Corporation [i.e., FDIC-R] shall be allocated -- (i) fully to the Bank Insurance Fund, if the expense was incurred directly as a result of the Corporation's responsibilities... as receiver[49]."

B. *There Are Two Types of "Claims".*

Being mislead by the FDIC, both lower courts failed to recognize, that there are two types of "claims" that the FDIC-R must deal with in administering a failed bank receivership. The first type of "claim", is "any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver...".(a "Bank Claim")[50]. This would include all "claims" against the failed financial institution seeking to assert any right to payment from the failed financial institution, or any rights with respect to assets acquired by the FDIC-R, that arise out of any act or omission of such failed financial institution.

The second type of "claim", which is involved in this case, is "any claim relating to any act or omission of...the Corporation as receiver," (an "Administrative Claim"). Id. This would include any "claim" against the FDIC-R, arising from its conduct (i.e., an act or omission) in administering the receivership estate. An "Administrative Claim" against the

---

[49] 12 U.S.C. §1821(a)(7)(C)(i).
[50] 12 U.S.C. §1821(d)(13)(D) (i).

FDIC-R, would include the payment of "monetary damages" resulting from the breach of an agreement by the FDIC-R[51].

The FDIC-R incurred an obligation to the Henrichs when the FDIC-R breached the reformed FDIC Settlement Agreement by failing to release the Balboa Lien, and instead, sold the Balboa Lien to the Henrichs[52]. The damages caused to the Henrichs from this breach by the FDIC-R, are required by law to be paid out of the Bank Insurance Fund, and **not out of the assets of the receivership estate**[53]. Therefore, having exhausted their administrative remedies, the Henrichs' claim is not moot.

C. *The FDIC Mislead The Lower Courts.*

The FDIC-R is required to pay all valid Bank Claims if the claim is filed in a timely manner. However, the FDIC-R is given "discretion" to pay a late Bank Claim[54]. **All Administrative Claims shall be paid** by the FDIC-R, out of the Bank Insurance Fund[55].

The lower Courts in this case were intentionally mislead by the FDIC, to believe that §1821(d)(5)(A) applied to Administrative Claims. The FDIC, in its Brief dated November 1, 2004, pp. 18-19 citing §1821(d)(5)(C)(ii) (II), proclaimed

---

[51] 12 U.S.C. §1821(d)(20).

[52] It should be noted that the FDIC-R had not breached its agreement with the Henrichs when it conveyed to them on November 16, 1995, assets, including the Balboa Lien, that the FDIC-R had acquired from Capital Bank. The breach occurred in 2004, when the state court judgment became final, which (i) reformed the FDIC Settlement Agreement to obligate the FDIC to release the Balboa Lien and then, (ii) ordered the Henrichs to reconvey the Balboa Lien. Obviously, if this Court determines that the Superior Court judgment is void, for lack of subject matter jurisdiction, the breach by the FDIC-R disappears.

[53] 12 U.S.C. §1821(a)(7)(c)(i).

[54] §1821(d)(5)(A) (i) and (B).

[55] 12 U.S.C. §1821(d)(20) and §1821(a)(7)(c)(i).

that: "This section envisions payment of meritorious claims against the receiver by the receivership estate[56]."

A review of the FDIC's "Table of Authorities",[57] indicates that the FDIC nowhere disclosed to the lower Courts that §1821(d)(20) and §1821(a)(7), require that **all Administrative Claims** are to be paid out of the Bank Insurance Fund, **and not from the assets of the receivership estate, even if the receivership estate had assets**.

D. *No Federal Policy Exists that the Fund Should Always Win.*

As recognized by this Court in 1994 in *O'Melveny*, at 88:

> "[N]either FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent [RTC] must mean by 'depletion' is simply the forgoing of any money which, under any conceivable legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, 'federal-common-law' cause of action to enrich the fund. Of course, we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments remarkably similar to the one made here."

Notwithstanding this Court having rejected "more money" arguments in cases prior to *O'Melveny,* as well as in *O'Melveny* in 1994, the FDIC continues, as it did in this case, to intentionally mislead courts as to its statutory duties to administer, adjudicate and pay "claims" from the Bank Insurance Fund. As recognized by the Ninth Circuit in this

---

[56] Ex. 7A, p. 18.
[57] Ex. 7A, pp iii – iv.

case, the First, Fifth, Seventh and Eighth Circuits all subscribe to the theory that there needs to be assets remaining in the receivership estate to pay claims, or the FDIC-R has no duty to even consider claims that arise later in the course of the FDIC-R's administration of the receivership estate! Henrichs, at 608.

This Court has recognized that specialized public agencies are constitutionally created by Congress, to apply an orderly, informed and specialized procedure to the complex administration of problems[58]. Because of the specialized skills of public agencies, deference is usually given to their decisions by the courts. However, the FDIC is obviously abusing this "deference" status, when it continues to represent to claimants and the courts, that no future claims can be resolved by the FDIC-R, or the FDIC-C, because no further funds are available in the receivership estate, or the receivership estate has been closed. This "no money" approach by the FDIC, was successfully reflected in the Ninth Circuit's decision in this case, as well as the other cases cited by the Ninth Circuit to support its "moot defense" theory[59].

The FDIC has been overzealous in attempting to protect the Bank Insurance Fund. If for no other reason, a Writ of Certiorari should be granted, to correct the FDIC's breach of its duties imposed by Congress to hear and resolve "claims", and to pay those claims that are approved, from the Bank Insurance Fund.

E. *The Dismissal Of The Henrichs "Claim" Against The FDIC-R, Violates The United States Construction.*

For this Court to preclude the Henrichs from having any remedy for the damages caused as a result of the reformation of

---

[58] See *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U.S. 206, 208-209 (1940).

[59] *Henrichs*, at 608.

the FDIC Settlement Agreement, would be an unconstitutional taking of property (i.e. the Balboa Lien), to satisfy an indebtedness of the FDIC-R to Valley View, which indebtedness, if it actually exists, should have been paid from the Bank Insurance Fund.

As recognized by this Court, the construction of a statute "is compelled by the cannon of statutory construction that statues should be construed to avoid a possible unconstitutional result[60]." "It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." Id.

The Court of Appeal for the District of Columbia[61], addressed the "no asset" argument of the FDIC, and recognized that in interpreting FIRREA:

> "The takings clause prohibits the taking of 'private property...for public use, without just compensation.' US CONST. amend. V. The court has recognized that property includes, 'the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.' United States v. General Motors Corp., 323 U.S. 373, 378, [citations omitted] (1945) "[62]

If state courts have subject matter jurisdiction to reform an agreement in which the FDIC-R is a party, and to order purchasers to return, or in this case reconvey, assets to third parties, for acts which the FDIC-R allegedly agreed to perform, but failed perform before an asset is sold, the Henrichs are deprived of property which in this case was worth approximately $460,000.00. In such a case, there has been a clear "taking" by the federal government, where, according to

---

[60] *United States v. Rumely*, 345 U.S. 41, 45 (1953).

[61] *Waterview Management Company v. FDIC*, 105 F.3d 696, 701 (D.C. Cir. 1997).

[62] Ex. 17a, p. 187a.

the FDIC, as well as the Ninth Circuit, no remedy exists to recover damages caused by the taking.

V. Reason Why A Writ Of Certiorari Should Be Granted.

A. *Lack of Subject Matter Jurisdiction.*

The first reason is that the Superior Court lacked subject matter jurisdiction to reform the FDIC Settlement Agreement, and its judgment is therefore void. A void judgment is a legal nullity and is subject to collateral attack[63].

B. *Exhaustion of Administrative Remedies.*

The second reason, as this Court recognized in *Waterman*[64]:

> "It is of paramount importance that courts not encroach upon this exclusive power...if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes.
>
> * * *
>
> It is essential that court's regard the division of responsibility which Congress as a matter of policy has embodied in the vary statute from which the Court of Appeal derived its jurisdiction to act. And therefore charges by public agencies constitutionally created...that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance. For this reason, we granted certiorari."

---

[63] *Calb v. Feuerstein*, 308 U.S. 433, 438 (1939).
[64] *NLRB v. Waterman*, at 209.

As this Court recognized in *Waterman*, it is essential that the courts regard the division of responsibility which Congress, as a matter of policy, has embodied in FIRREA. Obviously, Congress has deemed it wise to entrust the FDIC with the responsibility of adjudicating "claims" against failed financial institutions. The Henrichs believe that Congress has also deemed it wise to entrust the FDIC with the determination of rights with respect to assets which the FDIC has taken possession of, and has sold to a purchaser, even where the "claim" is based upon act or an omission by the FDIC in the administration of the receivership estate, and the "claim" arises after the receivership estate is closed.

Unlike in the *Waterman* case where the public agency challenged the courts interference with the exercise of the agency's administrative duties, in this case, the FDIC, once it sells an asset, and terminates a receivership, appears through it acts to believe that it can ignore the duties imposed upon it by Congress. Congress intentionally withdrew jurisdiction from all courts to adjudicate "claims", and delegated to the FDIC the duty to administer, adjudicate and pay both Bank Claims and Administrative Claims. It is clear, at least with respect to acts or omissions of failed banks, that it gave claimant's the right to file a federal action, only after the claimant had exhausted its administrative remedies.

If an Administrative Claim was approved by the FDIC or adjudicated by the FDIC, in administrative proceedings and resulted in a monetary award, Congress also imposed upon the FDIC the duty to pay such Administrative Claim. The only issue that remains, is do the federal courts have jurisdiction to review a final decision by the FDIC, with respect to an Administrative Claim[65].

C. *FDIC's Failure To Perform Duties.*

---

[65] See *Volges v. RTC*, 32 F.3d 50, 53 (2d Ar. 1994), cert. denied, 132 L. Ed. 2d 860, 115 S. Ct. 2618 (1995).

Because the FDIC only appoints a receiver for insolvent banks, it should be obvious that the value of assets of a failed bank, unless there is a major change in market conditions, will never be sufficient to satisfy all Bank Claims which the FDIC is obligated to pay, let alone Administrative Claims. The FDIC has repeatedly taken the position, in order to save the Bank Insurance Fund money, that it cannot pay any claims once the assets of the receivership are depleted, or it cannot pay any claims once the receivership has been terminated, or it has no duty to resolve or adjudicate a "claim" once the assets of the receivership estate are depleted. This position is both unconstitutional, as well as a failure of the FDIC to fulfill its statutory duties under FIRREA.

As has been demonstrated by the FDIC's response in this case, as reflected in Appendix, Exhibit 8a, the FDIC relies upon the "mootness defense", rather than performing its duties. The FDIC's response to the Henrichs' timely claim should have been to determine whether the claim was valid, and then to either rectify the problem by joining the Henrichs in convincing the District Court that the state court lacked jurisdiction to reform the FDIC Settlement Agreement, or to have paid the Henrichs' Administrative Claim. Instead, the FDIC asserted the "mootness defense."

Until this Court directs the FDIC to comply with FIRREA in its response to, and payment of, claims, consistent with its statutory duties, the FDIC will continue to assert the "mootness defense", base upon a "no assets" or "receivership terminated" theory. Lower courts, because of "deference to the FDIC", will continue to believe that when the receivership estate's assets have been depleted, or the receivership terminated, no further claim, whether a Bank Claim or an Administrative Claim, can be administered and paid.

As occurred in this case, when the Henrichs filed their Administrative Claim with the FDIC, the Henrichs never received an approval, or a denial, of their Administrative Claim. Again, the FDIC asserted that the receivership estate had been closed, the FDIC had no money, and therefore the Henrichs

were out of luck. Obviously, the FDIC has not set up a system to administratively deal with an Administrative Claim that may be filed by a purchaser of an asset, post termination of the receivership.

D. *Sub-Prime Mortgage Business.*

The volume of claims with respect to post receivership determination of rights of purchasers of assets from the FDIC maybe tapering off from the 1989 to 1995 period of numerous bank failures. However, on the immediate horizon is the failure of federally insured institutions engaged in the sub-prime mortgage business. This includes, the sub-prime-related securities business, which is based upon the bundling of sub-prime mortgages.

As recently observed by Harvard Law School Professor Elizabeth Warren: "Thrifts and savings banks account for 23% of the sub-prime mortgages issued in 2005, while bank holding companies, regulated under another federal régime, accounted for 25%."

This means that the FDIC will be faced in the near future with administering receivership estates for financial institutions who participated in the sub-prime mortgage market, who become solvent, a receiver is appointed, and whose assets will need to be liquidated or sold.

The decision by the Ninth Circuit in this case, will substantially impair the market value of sub-prime mortgages and sub-prime-related securities, acquired by the FDIC, if this Court does not promptly and clearly hold that the benefits of FIRREA that apply to the FDIC, unless expressly limited as provided for in §1821(d)(13)(C), are passed through to purchasers.

Furthermore, the FDIC's neglect, as well as intentional misrepresentations, with respect to its duties after assets of the receivership estate have been depleted, or the receivership has been terminated, will not only affect the fair market value of the sub-prime mortgages and sub-prime-related securities, but will

also affect the sale of other assets acquired from the failed financial institution, that the FDIC will have to liquidate or sell. If prospective purchasers have to be concerned that once they purchase an asset from the FDIC, Congress, the FDIC and the courts, will not enforce FIRREA, and the benefits it provides to enhance and stabilize the market value of the assets sold by the FDIC, they will not be willing to pay the same amount as they would if such purchaser, and the asset it acquires, have the protection Congress intended when it adopted FIRREA.

CONCLUSION

For reasons discussed above, this Court should issue a Writ of Certiorari granting the Henrichs' Petition, seeking a review of the decision of the Ninth Circuit in Henrichs v. Valley View Development. In the alternative, the Henrichs would request that this Court exercise its powers under Supreme Court Rule 16.1, and order a reversal and summary disposition on the merits.

Respectfully Submitted,

HUNT, ORTMANN, BLASCO,
PALFFY & ROSSELL, INC.
Jeffrey M. Epstein, Esq., Counsel of Record
Richard E. Blasco, Esq.
F. Glenn Nichols, Esq.
301 N. Lake Avenue, 7th Floor
Pasadena, CA 91101-1807
(626) 440-5200

(any footnote trail end of each document)

No. 04-56470

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HENRICHS; ANNE HENRICHS,
Plaintiffs-Appellants,

v.

VALLEY VIEW DEVELOPMENT, a California corporation; FEDERAL DEPOSIT INSURANCE CORPORATION, a Federal corporation; TIMCOR EXCHANGE CORPORATION, dba Timcor Financial Corporation; MARC GELMAN, an individual; MICHAEL BLAHA, an individual; GRANADA PLAZA ASSOCIATES LTD., a California limited partnership,
Defendants-Appellees.

September 12, 2006, Argued and Submitted, Pasadena, California

January 16, 2007, Filed

COUNSEL: Richard Blasco, Hunt, Ortman, Blasco, Palffy & Rossell, Pasadena, California, and F. Glenn Nichols, Law Offices of F. Glenn Nichols, Pasadena, California, for the appellants.

Barry R. Edwards, Spiegelman & Edwards, Beverly Hills, California, for appellees Valley View Development and Marc Gelman.

Kathleen V. Gunning and Mary Riche, Federal Deposit Insurance Corporation, Washington, DC, and Michael H. Bierman, Luce Forward Hamilton & Scripps, LLP, Los Angeles, California, for appellee Federal Deposit Insurance Corporation.

Peter L. Weinberger and A. Douglas Mastroianni, Peter L. Weinberger & Associates, Los Angeles, California, for appellees Michael Blaha and Granada Plaza Associates, Ltd.

JUDGES: Before: J. Clifford Wallace, M. Margaret McKeown, and Kim McLane Wardlaw, Circuit Judges.

OPINION BY: McKeown

OPINION

McKEOWN, Circuit Judge:

This appeal stems from a quiet title action that began in Los Angeles Superior Court but was resuscitated in federal court after the California courts ruled against appellants John and Anne Henrichs ("Henrichs") on all issues. We consider whether the district court had subject matter jurisdiction over Henrichs' claims arising from a California state court judgment rendered against him. After a series of real estate transactions among Henrichs, Valley View Development ("Valley View"), Marc Gelman, Michael Blaha, and Granada Plaza Associates ("GPA") turned sour, Valley View filed a claim to quiet title in Los Angeles County Superior Court. Henrichs cross-claimed, alleging breach of contract and indemnification claims. The Superior Court, the California Court of Appeal, and the

California Supreme Court all held in favor of Valley View and denied Henrichs relief on all claims.

Having extinguished all avenues for relief in the California courts, Henrichs filed suit in the United States District Court for the Central District of California. The district court held that it lacked jurisdiction under the *Rooker-Feldman* doctrine to review the state court judgment and Henrichs' associated claims and consequently dismissed the action. We now affirm, albeit on slightly different grounds. At issue is whether Henrichs' claims are barred by the *Rooker-Feldman* doctrine which, in general terms, prevents "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923)). Looking at each claim individually, as we must do, we conclude that two claims are barred by *Rooker-Feldman*, one claim fails on mootness grounds, and another based upon res judicata.

BACKGROUND

I. FACTUAL BACKGROUND

Although the intricacies of Henrichs' claims are not before us, the chronology of events, which includes various convoluted transactions, is helpful to understanding the relationship between the state and federal court actions. Henrichs' series of lawsuits arise

from a dispute relating to two plots of land in Granada Hills, California. In 1990, defendant Valley View owned property in Granada Hills that included two subdivisions, the Balboa lot and the Chatsworth lot. The GPA entity was formed to purchase only the Chatsworth lot from Valley View. John Henrichs, Michael Blaha, and Marc Gelman, Valley View's president and owner, were the original limited partners in GPA.

At that time, the final tract map separating the Balboa and Chatsworth lots had not been recorded. GPA and Valley View expected this approval would take significant time, and without a final tract map, the Chatsworth lot could not be sold separately from the Balboa lot. As a result, GPA purchased both lots from Valley View.

The parties signed an agreement (the "Ground Lease") in which Valley View leased the Balboa lot for one dollar per year for 99 years from GPA and Valley View received an option to purchase the lot back from GPA for one dollar when the final tract map was recorded. The Ground Lease provided that if Valley View exercised the purchase option, GPA would convey the Balboa lot to Valley View in fee simple, free of all liens and encumbrances.

GPA obtained a construction loan of almost $ 4 million from Capital Bank of California to finance construction on the Chatsworth lot. The loan agreement stated that the entire property -- both lots -- was collateral for the loan.

The final tract map was ultimately recorded in January 1992, and Valley View exercised the option in the Ground Lease to buy back the Balboa lot. Valley View believed that it had received title free and clear of any liens, including the pledge of collateral in the loan from Capital Bank.

In June 1993, the Federal Deposit Insurance Corporation ("FDIC") acquired the loan when it was appointed receiver of Capital Bank. GPA defaulted on the loan in 1994.

Following the default, GPA, Gelman, and Blaha agreed that GPA would pay the FDIC $ 300,000, and in exchange, the FDIC would cancel or assign the loan and the accompanying deed. The agreement (the "FDIC Settlement Agreement") contained an indemnification clause and a proviso that bound all parties to the agreement and their representatives and successors. GPA decided that the FDIC should assign the loan and accompanying deed, which occurred through a separate agreement (the "Assignment Agreement") in approximately the following shares: 22% to Henrichs, 12% to Randy Carpenter, and 66% to Blaha Construction and Development.

II. PROCEEDINGS IN STATE COURT

In 1996, Gelman obtained a preliminary title report that reflected a lien on the Balboa lot. Valley View then demanded that the assignees of the note -- Henrichs, Carpenter, and Blaha Construction and Development -- reconvey the deed to Valley View to eliminate the lien. When the assignees refused to reconvey, Valley View filed a state court action to quiet title to the Balboa lot.

Henrichs filed a cross-complaint alleging causes of action for indemnification under the FDIC Settlement Agreement and breach of contract by GPA, Gelman, and Blaha for failing to indemnify Henrichs.

The Los Angeles County Superior Court held that Valley View owned the Balboa lot free and clear of any encumbrance based on the Capital Bank loan and rejected Henrichs' claims for breach of contract and indemnification. The California Court of Appeal affirmed, and the California Supreme Court denied review.

During the pendency of the proceedings in the state courts, Valley View sold the Balboa lot for $ 550,000. Valley View placed these funds in a trust account with Timcor Exchange Corporation ("Timcor") pending the outcome of the state court action.

III. PROCEEDINGS IN THE DISTRICT COURT

Following his loss in state court, Henrichs filed a suit in federal court. The complaint asserted four claims: 1) a request for a declaratory judgment voiding the state court judgment awarding the Balboa lot to Valley View in fee simple and removing the lien on the property; 2) breach of the Assignment Agreement by the FDIC; 3) a claim for indemnification against GPA, Gelman, and Blaha for damages and legal expenses incurred by the state court litigation; and 4) a request for an injunction barring Timcor from giving Valley View the proceeds from the Balboa lot's sale because, according to Henrichs, Valley View was not entitled to those profits. The district court held that the *Rooker-Feldman*

doctrine barred all claims and dismissed the action for lack of subject matter jurisdiction.

ANALYSIS

We affirm the dismissal of Henrichs' claims.[1] We conclude that the *Rooker-Feldman* doctrine bars the claim for declaratory relief. The claim against the FDIC is moot. The doctrine of res judicata precludes the claim for indemnity against GPA, Gelman, and Blaha. Additionally, both *Rooker-Feldman* and the Anti-Injunction Act bar the claim for injunctive relief.

Before delving into a claim-by-claim analysis, we briefly outline the contours of the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine provides that federal district courts lack jurisdiction to exercise appellate review over final state court judgments. *Rooker*, 263 U.S. at 415-16; *Feldman*, 460 U.S. at 482-86; *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-84, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). Essentially, the doctrine bars "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced" from asking district courts to review and reject those judgments. *Id.* at 284. Absent express statutory authorization, only the Supreme Court has jurisdiction to reverse or modify a state court judgment. The clearest case for dismissal based on the *Rooker-Feldman* doctrine occurs when "a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision . . . ." *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003).

Rooker-Feldman does not override or supplant issue and claim preclusion doctrines. *Exxon Mobil*, 544 U.S. at 284. The doctrine applies when the federal plaintiff's claim arises from the state court judgment, not simply when a party fails to obtain relief in state court. *Noel*, 341 F.3d at 1164-65 (citing *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 729 (7th Cir. 1993)). Preclusion, not *Rooker-Feldman*, applies when "'a federal plaintiff complains of an injury that was not caused by the state court, but which the state court has previously failed to rectify.'" *Noel*, 341 F.3d at 1165 (quoting *Jensen v. Foley*, 295 F.3d 745, 747-48 (7th Cir. 2002)).

I. DECLARATORY RELIEF CLAIM

Henrichs argues that the state court exceeded its jurisdiction when it entered judgment against him. The request for relief is unambiguous. Henrichs asked the district court to "declare the State Court Judgment void, and enter judgment in favor of the Henrichs." Such a claim is squarely barred by *Rooker-Feldman*; a request to declare the state court judgment void seeks redress from an injury caused by the state court itself. *See Noel*, 341 F.3d at 1164-65.

Henrichs attempts to circumvent the jurisdictional bar by arguing that there was exclusive federal jurisdiction over all of his claims and thus the state court litigation was improper. To be sure, a state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction may be collaterally attacked in a district court. *In re Gruntz*, 202 F.3d 1074, 1079 (9th Cir. 2000). The difficulty with Henrichs' argument is

that there was no exclusive federal jurisdiction over the claims.

Henrichs grounds the exclusive jurisdiction argument on the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at various sections of Title 12). He relies on two provisions of the Act, which establishes the powers and responsibilities of the FDIC. *Id.* The first provision states that no court may grant equitable relief against the FDIC except as provided by FIRREA. 12 U.S.C. § 1821(j). The second provision states that individuals seeking to make claims that affect assets acquired by the FDIC in its capacity as a conservator or receiver must exhaust the FDIC's administrative claims process before seeking judicial review. 12 U.S.C. § 1821(d)(13)(D). *See Henderson v. Bank of New England*, 986 F.2d 319, 320-21 (9th Cir. 1993). Henrichs posits that the claims affect FDIC interests because the FDIC was the receiver of the assets of Capital Bank, and the FDIC in turn assigned the note to Henrichs.

The jurisdictional bars to state court litigation set out in FIRREA are not applicable here. Section 1821(j) does not apply because the FDIC was not a party to the state court litigation. It was Henrichs, not the FDIC, who was ordered to reconvey the note and deed referencing the Balboa lot.

Nor does § 1821(d)(13)(D) confer exclusive federal jurisdiction in this case. If, by citing this provision, Henrichs means to imply that the statute bars the state court's adjudication of the dispute with Valley View, he is mistaken -- the requirement to exhaust

administrative remedies applies only in an action against the FDIC as receiver. 12 U.S.C. § 1821(d)(13)(D); *see also McCarthy v. FDIC*, 348 F.3d 1075, 1080-81 (9th Cir. 2003)(holding that the exhaustion requirement applies to those who "challenge conduct by the FDIC as receiver"). At the time of the state court litigation, the FDIC had no interest in the note because it had already assigned the note. Although Henrichs attempts to paper over this fact by claiming that he stepped into the shoes of the FDIC for the purposes of the state court litigation, the statute does not reach assignees of assets once owned by the FDIC. Therefore, because the FDIC was neither a party to the state court lawsuit nor did it retain an interest in the previously assigned note, FIRREA does not confer exclusive federal jurisdiction over Henrichs' claims.

II. BREACH OF CONTRACT CLAIM

Henrichs next asserts a claim for damages against the FDIC stemming from the FDIC's alleged breach of the FDIC Settlement Agreement. Although this claim is not necessarily barred by *Rooker-Feldman*, it is moot. We -- and the district court -- have no jurisdiction over moot claims. *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th Cir. 1984) (as amended).

To satisfy Article III's case or controversy requirement, Henrichs "must have suffered some actual injury that can be redressed by a favorable judicial decision." *See FDIC v. Kooyomjian*, 220 F.3d 10, 15 (1st Cir. 2000) (holding that a claim against a failed bank was moot when the FDIC had determined there were no assets with which to satisfy the claim) (emphasis omitted). Henrichs may look only to the assets of the

Capital Bank receivership to satisfy any breach of contract claim. *See First Ind. Fed. Sav. Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992). The receivership distributed all of the failed bank's assets and was terminated in January 2001, fully three years before Henrichs raised the claim. No assets remain in the receivership to satisfy a late-filed claim, thus rendering the claim moot. *See Maher v. FDIC*, 441 F.3d 522, 525-26 (7th Cir. 2006); Kooyomjian, 220 F.3d at 15; *Adams v. Resolution Tr. Corp.*, 927 F.2d 348, 354 (8th Cir. 1991) (holding that where the Federal Savings and Loan Insurance Corporation would never possess any assets to satisfy the plaintiff's claim, the claim was moot).

III. INDEMNITY CLAIM

In the third claim, Henrichs asserts that GPA, Gelman, and Blaha must indemnify him for his legal expenses because he is a successor to the FDIC Settlement Agreement. In state court proceedings, Henrichs asserted an identical cause of action for indemnification based on the same FDIC Settlement Agreement and against the same three defendants. The Los Angeles County Superior Court denied relief, the California Court of Appeal affirmed, and the California Supreme Court denied review.

Res judicata prevents the district court from addressing Henrichs' indemnity claim. To determine the preclusive effect of a state court judgment, we look to state law. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 927 (9th Cir. 2006). In California, "[r]es judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." *Mycogen Corp. v.*

Monsanto Co., 28 Cal. 4th 888, 896, 123 Cal. Rptr. 2d 432, 51 P.3d 297 (2002). For purposes of res judicata, Henrichs' claim for indemnity has been finally determined by a court of competent jurisdiction and we may not revisit it now. n2 *See Rice v. Crow*, 81 Cal. App. 4th 725, 736, 97 Cal. Rptr. 2d 110 (2000).

IV. INJUNCTION CLAIM

In the final claim in district court, Henrichs seeks to enjoin Timcor from giving Valley View the proceeds from the sale of the Balboa lot. According to Henrichs, the state court judgment giving Valley View the lot in fee simple was void, so Valley View should not be able to appropriate profits from the lot's sale.

Both the *Rooker-Feldman* doctrine and the Anti-Injunction Act, 28 U.S.C. § 2283, bar this claim. *Rooker-Feldman* applies because the legal injuries Henrichs alleges arise from the state court's purportedly erroneous judgment. As framed by Henrichs, Valley View and Timcor possess funds from the sale of the Balboa lot only because the state court erred in awarding Valley View and Timcor that lot in the first place. Without the state court judgment, Valley View and Timcor would not have caused injury to Henrichs at all. Granting the injunction would require the district court to determine that the state court's decision was wrong and thus void. *Cf. Exxon Mobil Corp.*, 544 U.S. at 283-84 (holding that district courts do not have jurisdiction over cases in which plaintiffs complain of injuries caused by state court judgments).

The requested relief also is barred by the Anti-Injunction Act, which precludes a federal court from

granting "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress . . . ." 28 U.S.C. § 2283. The Act's mandate extends not only to injunctions affecting pending proceedings, but also to injunctions against the execution or enforcement of state judgments. *See Atlantic C. L. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287-88, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970). An injunction may not be used to evade the dictates of the Act if the injunction effectively blocks a state court judgment. *Id.*

The practical effect of the requested injunction would be to prevent Valley View from alienating the land in fee simple, which was the purpose of the quiet title action at the outset. To grant the relief would undo the effect of three California courts' unbroken agreement on the resolution of the issues Valley View presented and would disregard the principle of abstention the statute seeks to uphold. *Id.* at 284-88.

CONCLUSION

Because the district court lacked jurisdiction over three of the claims and a fourth claim is barred by res judicata, we affirm the district court's dismissal of the action.

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

fn1Subject matter jurisdiction is a question of law reviewed de novo. *Sahni v. Am. Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996) (as amended). We

may affirm the dismissal on any ground supported by the record. *Preminger v. Principi*, 422 F.3d 815, 820 (9th Cir. 2005).

fn2This claim is not barred by *Rooker-Feldman* because GPA, Gelman, and Blaha allegedly caused Henrichs' injury when they failed to indemnify Henrichs. Thus, the injury alleged in this claim does not arise from a state court judgment, but rather from the actions of an adverse party; hence, *Rooker-Feldman* does not apply.

Filed 8/13/2004
Case No. CV-04-04225 CAS (MANx)
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOHN HENRICHS; ANNE HENRICHS,
Plaintiffs

v.

VALLEY VIEW DEVELOPMENT, a California corporation; FEDERAL DEPOSIT INSURANCE CORPORATION, a Federal corporation; TIMCOR EXCHANGE CORPORATION, dba Timcor Financial Corporation; MARC GELMAN, an individual; MICHAEL BLAHA, an individual; GRANADA PLAZA ASSOCIATES LTD., a California limited partnership,
Defendants

ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

On June 16, 2004, plaintiffs John and Anne Henrichs (the "Henrichs") commenced this action against defendants Valley View Development ("Valley View"), Federal Deposit Insurance Corporation ("FDIC"), Timcor Exchange Corporation ("Timcor"), Marc Gelman ("Gelman"), Michael Blaha ("Blaha") and Granada Plaza Associates, Ltd. ("GPA"). The Henrichs assert claims for declaratory relief voiding a state court judgment, breach of contract, indemnity and injunctive

relief. Also on June 16, 2004, the Henrichs filed an ex parte application for a temporary restraining order to prevent defendants Timcor Exchange Corporation ("Timcor") and Valley View Development ("Valley View") from disbursing or expending funds arising from the sale of real property located at 10688 Balboa Boulevard, Chatsworth, California. The Court denied the ex parte application, but set a hearing for July 26, 2004, to consider whether the Court had subject matter jurisdiction over this action and whether preliminary injunctive relief should issue. Court's Order Denying Plaintiffs' Ex Parte Application for a Temporary Restraining Order, June 16, 2004.

The Henrichs submitted a brief addressing the aforementioned issues on July 6, 2004. Defendants Valley View and Gelman filed their opposition on July 19, 2004. Defendants GPA and Blaha filed their opposition, as well as joined in the opposition of Valley View and Gelman, on July 21, 2004, The Court heard oral argument on July 26, 2004. On July 30, 2004, the Henrichs filed a supplemental brief addressing issues raised at the hearing. Valley View and Gelman filed a reply to the supplemental brief on August 5, 2004. Having reviewed the parties' submissions, the Court now takes the matters under submission.

II. BACKGROUND

A. The Balboa Lot

In 1990, Valley View owned a lot in Chatsworth, California at the intersection of Balboa Boulevard and Chatsworth Street (the "Original Lot"). Plaintiffs Ex Parte Application for Temporary Restraining Order

("TRO App.") at 2. Valley View planned to subdivide the Original Lot into the "Chatsworth Lot" for residential use and the "Balboa Lot" for commercial use. Id. at 3. Sometime in December 1990, Valley View sold the Original Lot in its entirety to GPA. Id.[1] As a condition of the sale, Valley View leased the Balboa Lot from GPA for a 99 year term ("the Ground Lease"). Id. As a condition of the Ground Lease, Valley View obtained an option to purchase the Balboa Lot free and clear of all encumbrances, except those existing at the time the parties entered into the lease, when the final tract map reflecting the subdivision of the Original Lot was recorded. Id.

On December 31, 1990, GPA obtained a construction loan for $3,985,000 from Capital Bank to finance the construction of condominiums on the Chatsworth Lot. Id. That loan was secured by a note and trust deed ("Capital Note and Trust Deed") for the entire Original Lot. Id. Gelman, Valley View's president, and Blaha, an executive partner of GPA, personally guaranteed the Capital Note and Trust Deed. Id. As part of the loan transaction, Capital Bank entered into a written agreement with GPA and Valley View (the "Attornment Agreement"), which recognized the Ground Lease and provided that "[Capital Bank], or any such successor owner of the Property... will perform and be bound by all of the obligations imposed on [GPA] by the Lease." Opp. to Inj. at 2, citing Declaration of Marc Gelman ("Gelman Decl."), Ex. 4 (Attornment Agreement) at 90. The Attornment Agreement was recorded on January 3, 1991. Gelman Decl., Ex. 4 at 89.

On January 14, 1992, a final subdivision map was

recorded which allowed the Balboa Lot to be conveyed separately from the Chatsworth Lot. Id. Valley View then exercised its option to purchase the Balboa Lot and GPA conveyed title to Valley View. Id.

On June 18, 1993, the FDIC was appointed receiver of Capital Bank and acquired the Capital Note and Trust Deed. Id. at 3. In January 1995, a legal dispute arose between GPA and Valley View. Id. The dispute was settled in November 1995 by the execution of two settlement agreements. Id. By the first settlement agreement (the "Valley View Settlement"), Valley View, Gelman, GPA and Blaha agreed that GPA would purchase the Capital Note and Trust Deed from the FDIC for $300,000. Id. The FDIC was not a party to the Valley View Settlement Agreement. Id. By the second settlement agreement (the "FDIC Settlement Agreement"), GPA, Gelman, Blaha and the FDIC agreed that GPA would pay the FDIC $300,000 and the FDIC would cancel or, at GPA's option, assign the Capital Note and Trust Deed. Id.

GPA opted for the FDIC to assign the Capital Note and Trust Deed. Id. Consequently, the FDIC assigned the Capital Note and Trust Deed to various parties, including the assignment of a 22.38% interest to the Henrichs. Id.[2]

B. The State Court Litigation

In January 1996, Gelman discovered that the Capital Note and Trust Deed appeared on a preliminary title report for the Balboa Lot. Id. at 4. Believing that the Balboa Lot should not be encumbered by the Capital Note and Trust Deed

according to the terms of the Ground Lease and Attornment Agreement, Valley View filed suit to quiet title in Los Angeles County Superior Court, Case No. PC 019940, on August 6, 1997. Id.[3]

Following a bench trial, the Superior Court issued a "Statement of Decision" an October 7, 2002.[4] Plaintiffs' Request for Judicial Notice, Ex. 4.[5] The Statement of Decision provides in relevant part:

The court has considered the evidence received at trial and read and considered the parties' respective trial briefs and [Valley View's] brief regarding the "law of the case."

The Henrichs "purchased" a 22.38% share of the promissory note secured by deed of trust from the FDIC relating to the Chatsworth lot. The sole intent of Blaha, the Henrichs and Carpenter in purchasing this note was to remove the debt on the Chatsworth property to allow for sale of the remaining condominiums. Nothing further was contemplated. The last thing in anyone's minds was acquisition o an interest in the Balboa lot. Mr. Heinrichs testified that he did not know what collateral secured the note at the time that he acquired an interest in it. He did nothing to learn what collateral was attached to it at the time, and he did not speak to anybody except to Mr. Blaha, who told him at the time that he wanted him to participate that the Balboa parcel was not the incentive, but that the condominiums were the targets to generate a return on their investment. And in fact, what transpired was that the interest was transferred to the three participants - Blaha the Henrichs, and Carpenter, for approximately forty cents on the dollar,

or $300,000. They eventually foreclosed on the condominiums themselves, and split those assets among three beneficiaries, with the Henrichs selling two condos for approximately $200,000 on their investment of approximately $67,000. The Henrichs' position is that they would not part with their "interest" in the Balboa lot because that was worth, according to their counsel's statement in argument... $400,000. In essence, the Henrichs are trying to get something for nothing. That was never anyones intent and to find that way would unjustly enrich them. Such a windfall was never contemplated and the court will not sanction it.

Plaintiffs' Request for Judicial Notice, Ex. 4 at 2-3.

In order to effectuate the parties' intent in executing Valley View's option to purchase the Balboa Lot, the Valley View Settlement Agreement and the FDIC Settlement Agreement, the Superior Court ordered that the FDIC Settlement Agreement be reformed. Id. at 7. The Superior Court reasoned as follows:

The Court finds that [Valley View] is entitled to reformation of the FDIC agreement to recite the true intent of the parties that Valley View was to benefit from the FDIC agreement. Nothing in that agreement would adversely affect the parties by declaring that Valley View should be a beneficiary as it would only add to the clarification that Valley View, GPA and the FDIC intended to end their relationship over the Balboa and Chatworth lots.

The FDIC Settlement Agreement provides in paragraph 2 that the Obligors and the FDIC (including

their respective representatives, predecessors, successors and assigns) release each other "from any and all claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities of any kind or nature... with respect to the Note, Guarantees and Deed of Trust..." If the Balboa property was originally intended to be a part of the collateral for the GPA obligation by the bank then by the date of the FDIC settlement, both GPA and the FDIC were bound by the Ground Lease and Attornment Agreement. Thus the FDIC could not after succeeding to the interest of the bank thereafter take any action against the Balboa property or its fee owner, Valley View, for it had confirmed and cancelled any such claim in the Balboa property as collateral even though it had not expressly mentioned that parcel in the release and settlement agreement. This leads to the only conclusion possible that the Agreement contemplated that no claims be made against the Balboa parcel under the Capital Bank loan obligation.

The rights, if any, acquired in the Capital Bank Note and Deed of Trust by Blaha, Carpenter and [the] Henrichs were acquired as assignees of the FDIC through GPA's right as a party to the FDIC Agreement and paragraphs 2 and 9 of said Agreement specifically make the release applicable to them to the same extent as if they were the FDIC... The fact that neither the FDIC nor Capital Bank are parties in this action does not mean that the court cannot ascertain the parties' intent from the evidence presented. It is clear to me that neither Capital Bank, the FDIC, nor any of the parties ever contemplated that the Balboa [lot] was meant to secure the promissory note once the final subdivision map was approved and the lots legally

split into the Chatsworth and Balboa lots. Capital was looking only to the Chatsworth lot as security for its loan and that was the FDIC's interest as well.

Paragraph 8 of the FDIC Settlement Agreement allows that agreement to be urged as a complete defense to any claims arising out of any of the released matters. Pursuant to Civil Code sections 2941(a) and (b), the holders of the Capital Bank Deed of Trust were required to execute a certificate of discharge or reconveyance of the deed within 30 days from the satisfaction of the mortgage. The FDIC Settlement Agreement and inclusive release, together with the prior Attornment Agreement, served as the satisfaction of the note obligation as far as the Balboa parcel and its fee owner, Valley View is concerned. Valley View is entitled to reform the FDIC Agreement to recite that the Balboa property is released from the Capital Bank loan collateral and that the FDIC and/or its successors and assigns shall execute a reconveyance formally removing the lien against title.

Id. at 7-9.

In addition to finding in favor of Valley View on its claim for reformation the Superior Court also granted judgment in favor of Valley View on its claims for breach of contract, specific performance, and to quiet title. See id.

At trial, the Henrichs argued that the D'Oench, Duhme doctrine prevented the Superior Court from finding in favor of Valley View. Id. at 17. However, the Superior Court rejected this argument:

This doctrine of 12 U.S. Code 1823 has no application in this case. There were no "side deals or secret arrangements which might mislead bank examiners" or anyone else. As stated previously, the intent of the parties that the Balboa lot was to be made free and clear of the encumbrance of the promissory note and deed of trust was clear from the outset. The FDIC knew this and not misled by any type of side deal or secret arrangement.

Id.

C. Appellate Review

The Henrichs subsequently appealed the Superior Court's judgment to the California Court of Appeal. In an unpublished decision issued on January 27, 2004, the California Court of Appeal affirmed the judgment of the Superior Court. See Plaintiffs' Request for Judicial Notice, Ex. 2. With regard to the D'Oench, Duhme doctrine, the Court of Appeal found as follows:

At the time it entered into the construction loan contract with GPA, Capital Bank had actual notice of the ground lease between GPA and Valley View, and indeed was a party to the [Attornment] agreement which recognized the existence of the ground lease. In agreeing to make the construction loan to GPA, it was no secret to Capital Bank that GPA and Valley View had agreed the Balboa lot would be reconveyed to Valley View free and clear of any liens or encumbrances as soon as the lot was subdivided and a tract map recorded. Capital Bank and its successor, the FDIC, thus were never led to believe that the Balboa lot would remain part of the security for the

construction loan. The D'Oench Duhme Doctrine simply has no application here and cannot form the basis for barring reformation of the FDIC settlement agreement.

Id. at 38.

On March 8, 2004, the Henrichs filed a petition for review with the California Supreme Court. TRO App, at 10. The California Supreme Court denied the petition on May 12, 2004. Id. The Henrichs then initiated this action on June 16, 2004.

III. LEGAL STANDARD

"Federal courts are courts of *limited jurisdiction.*" Judge William A. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial § 2:1 (The Rutter Group 2002) (emphasis in original). "Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing the contrary rests upon the party asserting jurisdiction." Id. "Lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time..." Id.

Pursuant to the *Rooker-Feldman* doctrine, a federal court is without jurisdiction to exercise appellate review of state court judgments. *See Rooker v. Fidelity Trust*, 263 U.S. 413, 415-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-486 (1983). Specifically, the *Rooker-Feldman* doctrine prevents "a party losing in state court... from seeking what in substance would be appellate review of the state judgment in a United States District Court..."

Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (1994). Further, the doctrine prevents a district court from "adjudicat[ing] claims that are `inextricably intertwined' with the merits of a judgment rendered in a state court proceeding." *G.C. and K.B. Investments. Inc. v. Wilson*, 326 F.3d 1096, 1103 (9th Cir. 2003) (citations omitted). "[T]he crux of the question is whether there has already been actual consideration of and a decision on the issue presented." Id.

VI. DISCUSSION

The Henrichs argue that, pursuant to Federal Rule of Civil Procedure 60(b)(4), a federal court has jurisdiction to relieve a party from a final judgment when "the judgment is void." Application for Preliminary Injunction ("Inj. App.") at 8. The Henrichs argue that the Superior Court judgment at issue in this case is void because the Superior Court lacked subject matter jurisdiction. Id.

First, the Henrichs argue that the *Rooker-Feldman* doctrine does not apply in the instant case because Congress has granted exclusive jurisdiction over claims with respect to assets of any failed financial institution to the federal courts. Id. at 14.[6] Therefore, the Henrichs argue that the Superior Court did not have jurisdiction over the state court action which sought to determine rights with respect to the assets of a depository institution, i.e., the Balboa Lot, for which the FDIC was appointed receiver. Inj. App. at 2.

The Henrichs next argue that the state court judgment rendered in favor of Valley View is void because the Superior Court exceeded its jurisdiction in

reforming a contract to which the FDIC was a party. Inj. App, at 10. The Henrichs argue that no court, either state or federal, may grant equitable relief as against the FDIC. Id., citing 12 U.S.C. § 1821(j) ("[N]o court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.").

Finally, the Henrichs argue that the Superior Court lacked jurisdiction to reform the FDIC Settlement Agreement because the FDIC was an indispensable party. Inj. App. at 15.

Defendants Valley View and Gelman (referred to hereinafter as "defendants") respond that the Superior Court did not assume jurisdiction over any assets belonging to Capital Bank when it was taken over by the FDIC. Opp. To Inj. at 16. Defendants assert that the Superior Court found that none of the parties, including the FDIC, believed that the Capital Note and Deed of Trust encumbered the Balboa Lot when it was conveyed to Valley View, prior to the FDIC's acquisition of Capital Bank, and therefore the FDIC did not acquire an interest in the Balboa Lot. Id.

With regard to the issue of whether any court may grant equitable relief as against the FDIC, defendants argue that the Superior Court did not grant equitable relief as against the FDIC because the FDIC was not a party to the state court litigation. Id. at 13. Defendants argue that the Superior Court directed the Henrichs, not the FDIC, to reconvey the Capital Note and Trust Deed removing the lien against the Balboa Lot. Id., citing Plaintiffs' Request for Judicial Notice, Ex. 3

(Judgment) ¶ 5 ("John Henrichs and Anne Henrichs are ordered to execute and deliver to [Valley View] a Partial Reconveyance of the Capital Bank Deed of Trust, formally removing their lien interest against the Balboa Lot...").

Finally, defendants argue that the *Rooker-Feldman* doctrine precludes review of the state court litigation because the Superior Court granted judgment in favor of Valley View on multiple claims, including a claim to quiet title, and that the federal issues raised by the Henrichs in this action are "inextricably intertwined" with the Superior Court's adjudication of all of Valley View's claims. Id. at 18.

Pursuant to the *Rooker-Feldman* doctrine, this Court is generally without jurisdiction to exercise appellate review of state court judgments. However, "[a] state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts." *Gonzales v. Parks*, 830 F.2d 1033, 1036 (1987). Therefore, the Court will address whether the Superior Court judgment determines issues within the exclusive jurisdiction of the federal courts. The Court concludes that it does not.

The Superior Court determined, and this Court agrees, that the parties intended for the Capital Note and Trust Deed to encumber only the Chatsworth Lot. In 1994, the FDIC was aware that, under the terms of the Ground Lease and subsequent Attornment Agreement, Valley View had the option to purchase the Balboa Lot free of encumbrances and that Valley View had previously exercised that purchase option.

Therefore, the asset acquired by the FDIC from Capital Bank was the Capital Note and Trust Deed secured only by the Chatsworth Lot.[7] As such, a lien on the Balboa Lot was not an asset of the FDIC and the grant of exclusive federal jurisdiction under 12 U.S.C. § 1821(d)(6) does not apply to claims concerning the Balboa Lot. Therefore, the Superior Court did not exceed its jurisdiction in adjudicating Valley View's claims.[8]

Further, the Superior Court did not exceed its jurisdiction in ordering the reformation of the FDIC Settlement Agreement. The Superior Court did not order the FDIC to reconvey the Capital Note and Trust Deed in alleged violation of 12 U.S.C. § 1821(j), but rather issued injunctive relief only as against the Henrichs. As such, the Superior Court's order was within its jurisdiction.

Having determined that this action does not involve issues and claims within the exclusive jurisdiction of the federal courts, there is no basis for a determination that the Superior Court judgment is void. Consequently, the *Rooker-Feldman* doctrine applies in the instant case. Pursuant to that doctrine, the Court finds that it lacks subject matter jurisdiction over this action which impermissibly seeks review of the judgment of a state court.

V. CONCLUSION

For the foregoing reasons, this action is dismissed on the Court's motion for lack of subject matter jurisdiction. Plaintiffs' application for a preliminary injunction is therefore DENIED as moot.

IT IS SO ORDERED

Footnotes

Fn1Because a tentative subdivision map had been filed, the Chatsworth Lot could not be sold separately from the Balboa Lot. Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction ("Opp. to Inj.") at 1. In order to implement its development plans before the filing of the final subdivision map, Valley View sold the Original Lot to GPA but retained a lease on and option to repurchase the Balboa Lot. Id.

Fn2In addition, Randy Carpenter obtained an 11.9% interest and Blaha Construction obtained a 66.43% interest in the Capital Note and Trust Deed. Opp. to Inj. at 3.

Fn3 The Henrichs were among the parties defendant in the state court action.

Fn4The Superior Court initially granted Valley View's motion for summary judgment as to its claims, which decision was reversed by the California Court of Appeal on August 17, 2001, and the case was remanded to the Superior Court. On remand, Valley View filed a second amended complaint asserting for the first time a claim for reformation of the FDIC Settlement Agreement. TRO App. at 7. The matter was thereafter tried by the Superior Court and judgment in favor of Valley View was entered on January 22, 2003.

Fn5The Court hereby judicially notices the opinions issued by the Superior Court and California Court of Appeal in Valley View's suit to quiet title.

Fn6The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §§ 1811 et seq., established the FDIC. 12 U.S.C. § 1821(d)(5) provides that the FDIC has original jurisdiction over claims regarding a failed financial institution. Once administrative remedies within the FDIC have been exhausted, federal courts have exclusive jurisdiction to review such claims. 12 U.S.C. § 1821(d)(6).

Fn7 In their supplemental brief, the Henrichs argue that the "Superior Court found that the Balboa Lien was an asset of the FDIC on the date of entry of its Judgment." Plaintiffs' Supplemental Brief at 4. On the contrary, the Superior Court found that "[s]ince the FDIC did not consider the Balboa property as collateral for the loan, the Henrichs as the FDIC's assignees under the Note and Deed of Trust could not claim any greater rights." Plaintiffs' Request for Judicial Notice, Ex. 4 at 13.

Fn8 The Henrichs also argue that the Superior Court "exceeded its subject matter jurisdiction when it incorrectly concluded that the federal D'Oench Duhme doctrine, codified in 12 U.S.C. § 1823(e) had no application." Inj. App. at 1.

Section 1823(e) of FIRREA, codifying the holding of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), provides that no agreement which tends to diminish the interest of the FDIC in an asset it has acquired is valid unless that agreement is in writing and satisfies other certain requirements. The doctrine "precludes obligors from asserting side deals or secret agreements which may mislead bank examiners" which

diminish the value of the FDIC's interest in an asset. *FDIC v. Zook Bros. Constr. Co.*, 973 F.2d 1448, 1450-51 (9th Cir. 1992).

The Superior Court determined, and this Court agrees, that the D'Oench, Duhme doctrine did not apply in the state court litigation because there was no evidence that the Attornment Agreement was a side agreement which misled the FDIC. Rather, it appears that the Attornment Agreement complied with the requirements of section 1823. As such, the Superior Court did not exceed its jurisdiction in determining that the D'Oench, Duhme doctrine did not apply and that the court had jurisdiction over Valley View's state law claims.

Filed: 4/19/2007
No. 04-56470
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HENRICHS; ANNE HENRICHS,
Plaintiffs-Appellants,

v.

VALLEY VIEW DEVELOPMENT, a California corporation; FEDERAL DEPOSIT INSURANCE CORPORATION, a Federal corporation; TIMCOR EXCHANGE CORPORATION, dba Timcor Financial Corporation; MARC GELMAN, an individual; MICHAEL BLAHA, an individual; GRANADA PLAZA ASSOCIATES LTD., a California limited partnership,
Defendants-Appellees.

ORDER

JUDGES: Before: J. Clifford Wallace, M. Margaret McKeown, and Kim McLane Wardlaw, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges McKeown and Wardlaw have voted to deny the petition for rehearing en banc, and Judge Wallace so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

B164069

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

VALLEY VIEW DEVELOPMENT, Plaintiff and Respondent, v. JOHN HENRICHS et al., Defendants, Cross-Complainants, and Appellants; MICHAEL BLAHA et al., Cross-Defendants and Respondents.

January 27, 2004, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

COUNSEL: Spiegelman & Edwards and Barry R. Edwards for Plaintiff and Respondent Valley View Development, and for Cross-Defendant and Respondent Marc Gelman.

Law Offices of F. Glenn Nichols and F. Glenn Nichols; Hunt, Ortmann, Blasco, Palffy & Rossell and Richard E. Blasco for Defendants and Appellants.

Peter L. Weinberger & Associates, Peter L. Weinberger, A. Douglas Mastroianni, and Gerald J. Miller for Cross-Defendants and Respondents Michael Blaha and Granada Plaza Associates.

JUDGES: CURRY, J. We concur: EPSTEIN, J., Acting P.J., HASTINGS, J.

OPINION BY: CURRY

OPINION

INTRODUCTION

Defendants John and Anne Henrichs (hereafter collectively referred to in the singular as Henrichs) appeal from a judgment in favor of plaintiff Valley View Development (Valley View) quieting title to property referred to herein as the Balboa lot. This case was before us on a previous appeal, and after we remanded the case to the trial court, Valley View amended its complaint to add a cause of action for reformation. Valley View sought to reform a contract entered into between other entities, not parties to this appeal, on the basis that at the end of the day all parties intended that the Balboa lot should be reconveyed to Valley View, free and clear of all liens and encumbrances. After a bench trial, the trial court concluded that was indeed the intention of all parties, reformed the contract, and entered judgment in favor of Valley View quieting title to the Balboa lot.

On appeal Henrichs raises various contentions, including that the law of the case precludes the result reached by the trial court, and that Valley View was not entitled to reformation for numerous reasons. We find no merit in any of these contentions and affirm the judgment. As we shall explain, we further conclude that the trial court properly denied Henrichs's motion to

summarily adjudicate Henrichs's claim of entitlement to indemnity against various cross-defendants.

FACTUAL AND PROCEDURAL BACKGROUND

Valley View owned a lot in Granada Hills at the intersection of Balboa Boulevard and Chatsworth Street (the Original lot), described as lot 2 of tract 22411. It was planned the lot would be subdivided into the Chatsworth lot (16940 Chatsworth Street) and the Balboa lot (10668 Balboa Boulevard) and, by August 1990, tentative tract map 47539 was filed reflecting that plan. The Balboa lot had a dry cleaning business on it. Marc Gelman was president of Valley View.

Granada Plaza Associates, Ltd., a California limited partnership (GPA) was formed to purchase the Chatsworth lot from Valley View and develop a condominium project on it. Michael Blaha was the general partner of GPA, and also a limited partner. Randy Carpenter, John Henrichs, Marc Gelman, and Valley View were also limited partners of GPA.

Because the tract map for subdividing the Original lot had not yet been recorded, Valley View sold the entire Original lot to GPA in December 1990. GPA executed and delivered to Valley View a note for $ 73,147 and a deed of trust against the Original lot (the Valley View note and deed of trust). As to the Balboa lot portion, Valley View and GPA entered into a written ground lease on December 31, 1990, whereby Valley View, as tenant for 99 years and for $ 1 per month, would lease the property from GPA. GPA granted Valley View an option to purchase the Balboa lot for $ 1, after recordation of a final tract map for tentative tract

47539. The parties agreed that "At the close of the purchase escrow, [GPA] shall execute and deliver to [Valley View], or [Valley View's] assignee, a grant deed to the Premises conveying the Premises to [Valley View], *free and clear of all liens, encumbrances, charges, conditions, covenants, easements, restrictions, rights-of-way and other matters of record,* except those existing as of the date of this Lease and those created or caused by or with the written consent of [Valley View], including this Lease and any Leasehold Mortgage or any other matter affecting title to [Valley View's] leasehold estate." (Italics added.) GPA agreed Valley View would have quiet enjoyment of the premises "without hindrance on the part of [GPA] or any trust deed beneficiary. [P] [GPA] shall have the right to place an encumbrance upon its fee interest in the property providing any trust deed beneficiary agrees to enter into a Non-Disturbance Agreement with [Valley View]."

GPA obtained a construction loan of $ 3,985,000 from Capital Bank to finance construction of condominiums on the Chatsworth lot. To secure the loan, on December 31, 1990, GPA executed and delivered to Capital Bank a deed of trust against the Original lot (the Capital note and deed of trust). Also on December 31, 1990, Gelman and Blaha each delivered to Capital Bank their personal guaranties of the Capital Bank loan. The deed of trust was recorded on January 3, 1991.

On January 2, 1991, GPA (as landlord), Valley View (as tenant), and Capital Bank (as beneficiary) entered into a "Subordination, Non-Disturbance and Attornment Agreement" as to the Original lot, by which the parties recognized that GPA and Valley View "had entered into

the lease covering the premises in the property." The agreement was recorded on January 3, 1991. Therein, the parties acknowledged Capital Bank had made the construction loan to GPA evidenced by the Capital note, which note was to be secured by the mortgage covering the property. The lease was declared to be subordinate to the lien of the mortgage on the Original lot. Valley View acknowledged the lease was assigned to Capital Bank as security for the mortgage, and agreed that in the event GPA defaulted under the mortgage and Capital Bank demanded rent from Valley View, the latter would accept Capital Bank as landlord.[1] The agreement stated: "Nothing contained in this Agreement shall be construed to derogate from or in any way impair or affect the lien and charge or provisions of the Mortgage." "This Agreement shall inure to the benefit of the parties hereto, their respective successors and permitted assigns . . . ."

Subdivision of the Balboa and Chatsworth Lots

One year later, in January 1992, a final tract map subdividing the Original lot into the Balboa and Chatsworth lots was executed by Michael Blaha and Capital Bank, and recorded. On January 14, 1992, GPA, by grant deed, conveyed the Balboa lot (described as lot 2 of tract 47539) to Valley View. The deed was recorded on January 15, 1992.

Earthquake Damages the Condominiums on the Chatsworth Lot

On January 17, 1994, the condominiums that had been constructed on the Chatsworth lot were severely damaged by the Northridge earthquake.

On March 10, 1994, the Federal Deposit Insurance Corporation (FDIC) took over Capital Bank and thus acquired the Capital loan and deed of trust.

Thereafter, in January 1995, various controversies arose among Valley View, GPA, and Blaha. Valley View demanded payment from GPA of the Valley View $ 73,147 note. GPA filed for relief under chapter 11 of the Bankruptcy Code.

GPA, through Blaha, and Valley View, through Gelman, held settlement discussions on the disputes between them. These resulted in the execution on November 8, 1995, of the Valley View settlement agreement.

At about the same time, FDIC entered into a settlement agreement with GPA, Blaha, and Gelman (the FDIC settlement agreement).

Valley View Settlement Agreement

The Valley View settlement agreement is among GPA, Michael Blaha, individually, Valley View, and Marc Gelman, individually. It recites the following: that GPA was formed to acquire the land *at 16940 Chatsworth Street* and develop a multi-unit condominium complex for sale of the individual units to third parties; that GPA had sold 26 of the 36 units when the complex suffered severe earthquake damage in January 1994; that GPA filed for bankruptcy protection under chapter 11; that Valley View held a note from GPA for $ 73,147; that Capital Bank held a construction loan secured by a trust deed; that FDIC had acquired Capital Bank's interest; that GPA had agreed with FDIC to purchase

the Capital Bank loan for $ 300,000, payable on November 9, 1995; and that GPA, Blaha, Valley View, and Gelman had settled their disputes regarding the condominium complex in the manner set forth.

The agreement provided that Valley View would withdraw as a limited partner of GPA and agreed to "fully reconvey the Valley View Deed of Trust and cancel the Valley View Note. The indebtedness evidenced and secured by such documents . . . shall be deemed satisfied in full and no amounts whatsoever relating to such indebtedness shall be owed to Valley View or any of its direct or indirect beneficial owners." It further provided that Valley View would deposit a lien release, the original Valley View note and deed of trust, and a full reconveyance deed.

GPA "shall purchase or cancel, as GPA elects in its sole discretion, the Capital Bank Construction Loan from the FDIC. In connection therewith, the guaranties from Blaha and Gelman to Capital Bank shall be cancelled and rendered of no further force or effect whatsoever. GPA shall cause the original guaranty executed by Gelman to be stamped 'Cancelled' and returned to Gelman."

Gelman agreed to deposit sums (totaling $ 29,661) toward certain expenses, for the benefit of Blaha and GPA, and GPA agreed to deposit $ 300,000 to be used to purchase the Capital Bank loan. GPA agreed to dismiss its bankruptcy.

GPA and Blaha agreed "to release and discharge Valley View and Gelman and each and all of their officers, directors, agents, representatives, affiliates, attorneys,

principals, associates, employees, successors and assigns, and each of them, from any and all claims, demands, liabilities, actions and causes of action which GPA and/or Blaha has or hereafter may have, or claim or hereafter may claim to have, against Valley View and/or Gelman, by reason of any damages or injuries whatsoever incurred or sustained by GPA and/or Blaha and occasioned directly or indirectly by any action or omission of Valley View and/or Gelman, respectively, arising out of or in connection with the transactions contemplated by the Partnership Agreement, the Capital Bank Construction Loan, the Valley View Loan and/or any transactions related to any such matters, including the business affairs of GPA . . . ." In the same language, Valley View and Gelman agreed to release and discharge GPA and Blaha. The parties waived the limitations on general releases contained in Civil Code section 1542. The parties agreed to execute all further instruments necessary to carry out the agreement.

"This Agreement and the terms and provisions hereof shall inure to the benefit of and be binding upon the parties hereto and their permitted successors and assigns."

FDIC Settlement Agreement

At about the same time, FDIC, as successor to Capital Bank, entered a settlement agreement and mutual release with GPA, Blaha, and Gelman. The agreement refers to GPA, and to Blaha and Gelman individually, as "Obligors," and FDIC and Capital Bank collectively as FDIC. It recited: "The parties desire to settle any and all claims of FDIC against GPA, and its partners or guarantors, and to cancel or, at the option of GPA,

assign the obligations under" the note secured by deed of trust between GPA and Capital Bank, "to cancel the obligations under any and all personal guaranties of GPA's obligations under the Note," and "to remove or, at the option of GPA, assign any and all encumbrances caused by the recording of" the Capital deed of trust.

The parties agreed that "the sole consideration for executing this Agreement and for releasing said claims, demands, sums of money, actions, rights, causes of action, debts, obligations and liabilities is the payment by Obligors of $ 300,000, and the cancellation and return or, at the option of GPA, assignment of the Note, Guaranties and Deed of Trust. FDIC hereby agrees to deliver or, at the option of GPA, assign the original Note, Guaranties and Deed of Trust at or about the time of the execution of this Agreement. At the option of GPA, rather than effecting cancellation, FDIC will assign the Note and Deed of Trust to any party designated by GPA. In any event, FDIC shall cancel and deliver to counsel to GPA and to Gelman the Guaranties."

"The Obligors and FDIC hereby release, discharge and acquit each other and their respective representatives, including, without limitation, agents, employees, limited partners, general partners, servants, attorneys, assigns, predecessors and successors, subsidiaries and affiliates, and each of them, of and from any and all claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities of any kind or nature whatsoever which each has, may have had or claim to have had, or now have or claim to have, or hereafter may have or assert to have with respect to the Note, Guaranties and Deed of Trust or any claim or

cause of action that could have been asserted by the Obligors or FDIC in connection therewith." The parties waived the limitations on general releases contained in Civil Code section 1542.

"This Agreement shall inure to the benefit of the Obligors and FDIC and shall be binding upon the Obligors and FDIC and their representatives, and successors."

Assignment of the Capital Note and Deed of Trust

On November 16, 1995, FDIC was paid the $ 300,000 settlement sum. At the same time, FDIC executed an assignment of the Capital note and deed of trust as follows: "For value received, the FDIC[] hereby assigns and transfers all of its right, title and interest in and to the Deed of Trust, but without recourse, representation or warranty, expressed or implied, to the following persons (collectively, the 'Assignees'), and their successors and assigns, as tenants in common: (i) Blaha Construction and Development, Inc., as to a 66.43% interest in the Deed of Trust; (ii) John and Anne Henrichs, as to a 22.38% interest in the Deed of Trust; and (iii) Randy Carpenter, as to a 11.19% interest in the Deed of Trust." (Italics added .) In the same manner and respective percentages, FDIC assigned the Capital note of $ 3,985,000, "together with all sums of money due and to become due on the Note."

Notice of Trustee's Sale

In January 1996, Gelman, on behalf of Valley View, demanded that the assignees reconvey the lien of the Capital trust deed to the extent of the encumbrance on

the Balboa property. They refused to do so, and instead in October 1998 caused a notice of trustee's sale to be recorded with respect to the entire Original lot including the Balboa property. The notice of trustee's sale listed the property to be sold as eight designated condominium units at 16940 Chatsworth Street, and the property at 10668 Balboa Boulevard.

Valley View obtained a preliminary injunction against foreclosure on the Balboa property, pending resolution of Valley View's claims in this suit.

The assignees foreclosed on the Chatsworth property for $ 648,000.

The Earlier Proceedings and Trial, and the Prior Appeal

Valley View filed suit seeking, among other things, to quiet title to the Balboa property. Valley View moved for summary adjudication of issues as to its causes of action for specific performance of the Valley View and FDIC settlement agreements, for declaratory relief, and to quiet title. Valley View contended Henrichs had no enforceable security interest in the Balboa lot. The trial court agreed and granted summary adjudication, after which Valley View dismissed all remaining causes of action save for slander of title. The matter proceeded to a court trial after which the court ruled that Valley View failed to prove Henrichs acted unreasonably and in bad faith in asserting the enforceability of the trust deed. The trial court rendered judgment to the effect that Valley View was the sole owner in fee simple of the Balboa lot and that Henrichs had no interest in the

Balboa property, and that Valley View take nothing against Henrichs for slander of title.

Henrichs appealed from the first portion of the judgment, and Valley View appealed from the portion of the judgment as to slander of title.

In an opinion filed August 17, 2001, this court held that the FDIC settlement agreement did not extinguish the Capital note by satisfaction but instead assigned FDIC's interests in the note and trust deed to Henrichs (and others), and that the Valley View settlement agreement released GPA's and Valley View's claims against each other but did not extinguish GPA's obligation to Capital. Accordingly, we reversed the judgment quieting title in Valley View to the Balboa property and holding Henrichs had no interest in the Balboa property. However, we expressly remanded the matter for trial rather than entering judgment in favor of Henrichs.[2]

Further Trial Court Proceedings and the Bench Trial

Upon remand, in November 2001, Henrichs requested leave to file a cross-complaint stating causes of action for express contractual indemnity based on the provision in the FDIC settlement agreement, and for breach of the FDIC settlement agreement. The court granted the motion.

In December 2001, Valley View filed a motion requesting leave to file a second amended complaint alleging causes of action for reformation of the FDIC settlement agreement, breach of contract, specific performance, fraud, negligent misrepresentation, quiet

title, declaratory relief, and rescission. Over the objection of Henrichs, the court permitted Valley View to file the second amended complaint.

In its cause of action for reformation Valley View alleged that the FDIC settlement agreement, as written, did not represent the true intent of the parties in that it did not expressly require that the Balboa lot be released and reconveyed to Valley View in the event of any assignment and did not expressly release any claims against Valley View and the Balboa lot based on the Capital note and deed of trust. The failure to reflect the true intent of the parties resulted from mutual mistake of all parties involved.

As to the cause of action for reformation, Valley View requested the following relief: "For an order that the FDIC Settlement Agreement be reformed to embody the true agreement of the parties as follows: A paragraph shall be added to the FDIC Settlement Agreement which would state: 'This Agreement is expressly intended to benefit Valley View Development and to release any and all claims which might be asserted against Valley View Development by any party hereto or its successors or assigns, including, but not limited to, those arising under the Construction Trust Deed. In the event that the Construction Trust Deed is assigned and not canceled or fully reconveyed, any assignee shall immediately cause the lien or encumbrance, if any, of the Construction Trust Deed to be released and reconveyed with respect to the property commonly known as 10668 Balboa Boulevard, Granada Hills, and more particularly described as: [P] Lot 2 of Tract 47539 . . . [P] so as to provide Valley

View Development with free and clear title to the Balboa Parcel."

Valley View also sought specific performance to compel Henrichs to cause the lien or encumbrance on the Balboa lot to be fully released, and further sought entry of judgment quieting title to the Balboa lot. The rescission cause of action sought to rescind Valley View's 1992 exercise of the option to purchase the Balboa lot, and to reinstate its tenancy under the ground lease.

Blaha Construction and Carpenter (the other assignees of the Capital note and deed of trust) entered into a settlement with Valley View in 2000. In April 2002, the trustee under the Capital deed of trust completed a foreclosure sale of the Balboa lien, accepting a credit bid by Henrichs for $ 210,000. However, because no instrument evidencing a termination of the interests of Blaha Construction and Carpenter had been recorded, the trustee refused to execute a trustee's deed showing title vested solely in Henrichs.

Henrichs filed motions for summary adjudication as to both the complaint and the cross-complaint; the trial court denied the motions. Valley View and Gelman filed a motion for summary judgment on Henrichs's cross-complaint for indemnity, which was granted. GPA and Blaha also filed a motion for summary judgment on the cross-complaint, which was granted.

The matter proceeded to a bench trial. Gelman testified that when Valley View sold the land to GPA, it did not include the value of the Balboa lot in setting the sale price of the Chatsworth lot. In entering into the ground

lease, he intended to provide that Valley View would have exclusive possession and control rights over the Balboa lot. In entering into the subordination agreement, he intended in part to ensure that Capital Bank would honor the terms and conditions of the ground lease. He understood that Capital Bank would not look to the Balboa lot in the event of default on the construction loan by GPA. Gelman previously stated in his declaration in opposition to Henrichs's motion for summary adjudication that when Valley View exercised its purchase option, he believed GPA conveyed title free and clear of any liens created after the ground lease, including the Capital note and deed of trust. The purpose of the Capital loan was only to finance construction of condominiums on the Chatsworth lot.

Blaha, general partner of GPA, testified that when GPA acquired the property from Valley View, GPA ultimately intended only to obtain ownership in the Chatsworth lot. GPA only intended to construct condominiums on the Chatsworth lot; the Balboa lot was never intended to be a part of the condominium project. He understood that entering into the ground lease was necessary to keep the Balboa lot segmented from the Chatsworth lot. Prior to the time when Henrichs acquired the interest in the Capital note and deed of trust, Blaha did not discuss with Henrichs whether or not the Balboa lot was encumbered by the Capital deed of trust. They only discussed what the condominium units were worth and the amount owing on the note. He did not realize until sometime in 1995, after the FDIC settlement agreement was executed, that "technically, the Balboa parcel was still encumbered," and he was surprised when he discovered

that it was. Prior to that time, he never thought about whether or not the deed of trust encumbered the entire original lot. Blaha testified that after GPA filed for bankruptcy, the FDIC claimed as collateral in the bankruptcy proceedings only the ten unsold condominium units. During settlement negotiations with the FDIC with regard to the Capital note and deed of trust, whether or not the note and deed of trust still encumbered the Balboa lot was not discussed; the focus was solely on the value of the condominiums.

At the conclusion of the trial, the court entered judgment for Valley View, based on its conclusion that Valley View was entitled to reformation of the FDIC agreement to recite the true intent of the parties. The court declared Valley View to be the rightful owner of the Balboa parcel free and clear of the claims of Henrichs as assignee of the Capital Bank/FDIC Promissory Note and Deed of Trust. n3 Henrichs was ordered to execute and deliver to Valley View a partial reconveyance of the Capital Bank deed of trust, formally removing the lien interest against the Balboa lot.

This appeal followed.

DISCUSSION

I. The Law of the Case Does Not Preclude the Trial Court's Subsequent Rulings and Judgment

Henrichs contends that this court's prior opinion precluded the trial court from redetermining the intent of the parties. Henrichs asserts that the trial court "abused its discretion when it allowed Valley View to

amend its complaint to allege other 'express and implied understandings of all parties that it would be receiving free and clear title to the Balboa parcel.' The construction by this Court of the FDIC and Valley View Settlement Agreements determined that the Balboa Lien was not extinguished by the FDIC Settlement Agreement. This issue has been adjudicated, and is the law of the case." We disagree.

We previously reviewed the entry of judgment in favor of Valley View which followed the trial court's granting Valley View's motion to summarily adjudicate the issue of whether, based upon the provisions of the Valley View and FDIC settlement agreements, Henrichs had an enforceable security interest in the Balboa lot.

In interpreting the FDIC settlement agreement, we concluded that the payment of only $ 300,000, where the outstanding amount due on the Capital note was over $ 700,000, did not satisfy the obligation or extinguish the debt. We rejected Valley View's argument that even if the releases in the FDIC settlement agreement were between FDIC and the Obligors, the assignees had no greater rights than FDIC because the settlement extended to the parties' assigns and stated that the agreement was binding on the Obligors and FDIC "'and their representatives, and successors.'" We held that such an interpretation was at odds with the language of the agreement that expressly contemplated the assignment to the assignees, for value received of $ 300,000, of the Capital note and trust deed. We further found that the language in the FDIC settlement agreement releasing Gelman and his affiliates from Gelman's personal guaranty "did not mean Valley View's Balboa property [was] released from the

security of the Capital note and trust deed, which the agreement expressly assigns rather than extinguishes. The FDIC agreement was with GPA, and with Blaha and Gelman individually, as guarantors, not with Valley View."

In interpreting the Valley View settlement agreement, we concluded that Capital Bank was not a party to the Valley View settlement agreement, and the agreement had nothing to do with Capital Bank's secured interest in the Original lot. Although GPA in the Valley View settlement agreement released Valley View from claims of GPA arising from Valley View's conduct, the agreement did not release Valley View's property, the Balboa lot, from Capital Bank's security interest.

Thus, we found that the language of the two settlement agreements did not support the trial court's conclusion that Valley View was the sole owner in fee simple of the Balboa lot and that Henrichs had no interest in the Balboa property. However, in no way did our prior opinion foreclose the possibility that Valley View could demonstrate that the parties' actual intent--as evidenced by the language of the ground lease, and the subordination, non-disturbance and attornment agreement, as well as other extrinsic evidence--was that the Balboa lot would be released as security for the Capital deed of trust in the event the deed of trust was assigned rather than cancelled or fully reconveyed (once a subdivided tract map was recorded). Our decision did not preclude Valley View from arguing on remand that, while indeed the FDIC settlement agreement did not reveal the parties' mutual intent to release the Balboa lot as security for the Capital note and deed of trust, it should have, and reformation was

therefore warranted. Reformation of the FDIC settlement agreement to insert a provision stating that the Balboa lot was to be released as security for the Capital note and deed of trust is not *at odds* with any of the conclusions we previously reached in interpreting the agreement. Such a provision would not be in conflict with or contradict the existing language of the agreement as we interpreted it.

II. Reformation of the FDIC Settlement Agreement

The trial court permitted Valley View to amend its complaint to add a cause of action for reformation, rejected Henrichs's attempt to defeat the cause of action by way of summary adjudication, and found after a bench trial that reformation of the FDIC settlement agreement was warranted. Henrichs argues on appeal that the trial court was in error.

The Law of Reformation

"'When, through . . . mistake . . ., a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.' (Civ. Code, § 1640.) If there is 'a mutual mistake of the parties,' a written contract 'may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.' (*Id.*, § 3399.) In reforming the written agreement, a court may 'transpose[], reject[], or supply' words (*Heidlebaugh v. Miller* (1954) 126 Cal. App. 2d 35, 38 . . .), but has '"no power to make new contracts for the parties."' (*Bailard v. Marden* (1951) 36 Cal.2d 703, 708 . . ., quoting 22 CalJur. (1925)

Reformation of Instruments, § 2, p. 710). Rather, the court may only reform the writing to conform with the mutual understanding of the parties at the time they entered into it, if such an understanding exists. (*Bailard*, at p. 708.)" (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524.)

"In determining whether a mutual mistake has occurred, a court may consider parol evidence. (*Chastain v. Belmont* (1954) 43 Cal.2d 45, 51 . . . (*Chastain*).) Such evidence is admissible to show mutual mistake even if the contracting parties intended the writing to be a complete statement of their agreement. (See Code Civ. Proc., § 1856, subd. (e).) 'It is the rule that, where the writing itself, through mistake, does not express the intention of the parties who entered into it . . . and the writing does not therefore contain the real contract between the parties, the objection as to parol evidence is without merit.' [Citation.] Extrinsic evidence is necessary because the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions. (See *French v. Brinkman* (1963) 60 Cal.2d 547, 552-553, 35 Cal. Rptr. 289 . . . .)" (*Hess v. Ford Motor Co., supra*, 27 Cal.4th at p. 525.)

Contentions on Appeal

In addition to arguing that the law of the case precluded reformation, an argument we have rejected above, Henrichs argues that (1) the parties to the agreement are indispensable parties in a reformation action; (2) reformation would require rewriting the contract and the outright elimination of provisions in

the FDIC settlement agreement to the effect that all encumbrances were to be assigned (or cancelled); (3) Valley View was required to establish that it was a third party beneficiary of the FDIC settlement agreement to maintain a cause of action for reformation, and failed to do so; (4) Valley View cannot assert rights greater than those of the parties to the contract; and (5) the D'Oench Duhme doctrine barred reformation of the FDIC settlement agreement.[4]

1. Parties to the Agreement Are Not Always Indispensable Parties

Henrichs asserts that "it is a self-evident principle of law that the actual parties to a contract are necessary parties in an action brought to reform the contract," citing *Wilson v. Shea* (1924) 194 Cal. 653. That, however, is not the case. At page 658, *Wilson* cites to the *general* rule that in actions for reformation of agreements all persons *whose interests in the subject matter will be affected by the decree* are necessary parties and must be joined as parties. It is true that FDIC, GPA, Blaha, and Gelman were parties to the FDIC settlement agreement and are not named as parties, but their participation is not required here because their interests are not affected by permitting reformation of the FDIC settlement agreement. By that agreement, FDIC released *all* of its rights pertaining to the Capital note and deed of trust, and it does not matter whether or not the security involved included the Balboa lot. Similarly, GPA's, Blaha's and Gelman's interests are not affected by reformation of the agreement. Only Henrichs's interests are at issue.

2. Added Language Not in Conflict With Existing

Provisions

Henrichs argues that reforming the FDIC settlement agreement as Valley View requests requires rewriting the contract, and the outright elimination of the existing provisions to the effect that *all* encumbrances were to be assigned (or cancelled). As previously stated, in reforming a written agreement, a court may transpose, reject, or supply words to conform with the mutual understanding of the parties at the time they entered into it, but cannot make a new contract. (*Hess v. Ford Motor Co., supra,* 27 Cal.4th at p. 524.) The trial court properly allowed the addition of words to express the contracting parties' understanding that the Balboa lot was not intended to form part of the security for the Capital note and deed of trust once it was subdivided and could be reconveyed to Valley View. The provisions regarding assignment or cancellation of all encumbrances then simply refer to the remaining security, i.e., the Chatsworth lot. We find no error.

3. Third Party Beneficiary Status

Henrichs contends that Valley View failed to establish that it was an intended third party beneficiary of the FDIC settlement agreement, and therefore cannot seek reformation of that agreement. We conclude that Valley View demonstrated to the trial court's satisfaction, as it was required to do, that it was indeed an intended third party beneficiary of the FDIC settlement agreement. (See *American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal. App. 3d 951, 175 Cal. Rptr. 826.)

The ground lease stated that upon Valley View's exercise of its option to purchase the Balboa lot after subdivision of the Original lot, GPA was to deliver to Valley View a grant deed free and clear of all liens and encumbrances, and agreed Valley View would have quiet enjoyment of the premises "without hindrance on the part of [GPA] or any trust deed beneficiary." Concurrently with execution of the Capital note and deed of trust, GPA, Capital Bank and Valley View executed the subordination agreement, which recognizes the existence of the ground lease. Taken together, these documents constitute an "objective manifestation of mutual intent" that the Balboa lot was to be released as security once the subdivision occurred. In entering the FDIC settlement agreement, GPA and FDIC intended to settle all matters relating to the Original lot, and it was only through mutual mistake that the Balboa lot was not released rather than assigned. Valley View established that it was entitled to reformation of the FDIC settlement agreement, and that the reformed agreement would make clear the parties' direct intent to benefit Valley View. Valley View is not precluded, as Henrichs argues, from reforming the instrument to create and insert the very benefit it is claiming.

4. Valley View's Right to Seek Reformation Was Not Compromised

Henrichs claims that a third party beneficiary cannot assert rights greater than those of the parties to the contract (citing *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal. App. 3d 122, 226 Cal. Rptr. 321), and that the parties to the FDIC settlement agreement waived their rights to bring an

action for reformation. The FDIC settlement agreement sets forth that "The Obligors and FDIC further warrant, represent, and agree that in executing this Agreement, they do so with full knowledge of any and all rights which they may have with respect to the controversies herein compromised. The Obligors and FDIC further state that they are not relying and have not relied on any representation or statement made by the other with respect to the facts involved in said controversies or with regard to their rights or asserted rights. The Obligors and FDIC hereby assume the risk of all mistakes of fact with regard to said controversies and with regard to all facts which are now unknown to the Obligors and/or FDIC relating thereto." Henrichs argues based on this language that Valley View cannot seek to reform the agreement.

It is well settled that the remedy of reformation is equitable in nature. (*Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 388.) Failure to apply reformation in this case would result in a windfall to Henrichs which the parties clearly did not intend. It would be highly inequitable to bind Valley View to a waiver set forth in the FDIC settlement agreement; GPA and FDIC were not at liberty to waive Valley View's right to bring the present action to reform the agreement to conform with everyone's understanding of the deal.

5. The D'Oench Duhme Doctrine Does Not Apply

As the trial court found, "The doctrine of 12 U.S. Code 1823 has no application in this case. There were no 'side deals or secret arrangements which might mislead bank examiners' or anyone else. . . . The intent of the parties

that the Balboa lot was to be made free and clear of the encumbrance of the promissory note and deed of trust was clear from the outset. The FDIC knew this and was not misled by any type of side deal or secret arrangement." (See *Resolution Trust Corp. v. Kennelly* (9th Cir., 1995) 57 F.3d 819; see also 12 U.S.C. § 1823, subd. (e).) At the time it entered into the construction loan contract with GPA, Capital Bank had actual notice of the ground lease between GPA and Valley View, and indeed was a party to the subordination agreement which recognized the existence of the ground lease. In agreeing to make the construction loan to GPA, it was no secret to Capital Bank that GPA and Valley View had agreed the Balboa lot would be reconveyed to Valley View free and clear of any liens or encumbrances as soon as the lot was subdivided and a tract map recorded. Capital Bank and its successor, the FDIC, thus were never led to believe that the Balboa lot would remain part of the security for the construction loan. The D'Oench Duhme doctrine simply has no application here and cannot form the basis for barring reformation of the FDIC settlement agreement.

III. Denial of Summary Adjudication of Cross-Complaint for Indemnity

Henrichs brought a motion for summary adjudication of his cross-complaint seeking indemnity from Gelman, Blaha, and GPA.[5] Therein, Henrichs asserted as an undisputed fact that upon the assignment of the note and trust deed by the FDIC to Henrichs, the latter became the successor-in-interest to all of the FDIC's rights, title, and interests under the FDIC settlement agreement. Paragraph 8 of the FDIC settlement

agreement states: "Each party agrees to indemnify and hold the other harmless from and against any and all claims, demands, damages, debts, liabilities, obligations, costs, expenses, liens, attorneys' fees, actions and causes of action (whether or not litigation be commenced) arising from any matter released herein or in connection with any lawsuit or other proceeding brought or prosecuted contrary to the provisions of this Agreement. The Obligors and FDIC agree that this Agreement may be pleaded as a complete defense and/or as a cause of action in a cross-complaint, counterclaim, cross-claim or third-party complaint in each such lawsuit and proceeding." Paragraph 9 stated: "This Agreement shall inure to the benefit of the Obligors and FDIC and shall be binding upon the Obligors and FDIC and their representatives, and successors."

The argument must fail because Henrichs was assigned only the FDIC's interest in the note and deed of trust, and did not become the successor-in-interest to all of the FDIC's rights, title, and interests under the FDIC settlement agreement. Henrichs was FDIC's assignee only to the limited extent stated in the assignment of the promissory note and deed of trust. Henrichs cannot benefit from the indemnity provision contained in the FDIC settlement agreement. Although paragraph 2 of the agreement defines "representatives" as including "assigns," and paragraph 9 specifies the agreement is binding upon the FDIC's representatives, Henrichs cannot avoid the fact that only the FDIC's interests under the note and deed of trust were assigned. FDIC did not assign to Henrichs its interests under the FDIC settlement agreement, as, for example, its right to

collect $ 300,000. The motion for summary adjudication was properly denied.

DISPOSITION

The judgment is affirmed.

CURRY, J.

We concur:

EPSTEIN, J., Acting P.J.

HASTINGS, J.

Footnotes

[1]The agreement specified: "In the event of foreclosure of the Mortgage, or upon a sale of the Property pursuant to the trustee's power of sale contained therein, or upon a transfer of the Property by conveyance in lieu of a foreclosure, then: [P] (a) Non-Disturbance. So long as Tenant [Valley View] complies with this Agreement and is not in default under . . . the Lease, the Lease shall continue in full force and effect as a direct lease between the succeeding owner of the Property and Tenant . . . subject to all of the . . . conditions of the Lease. . . . ***Beneficiary [Capital Bank], or any such successor owner of the Property, will not disturb the possession of Tenant, and will perform and be bound by all of the obligations imposed on the Landlord [GPA] by the Lease*** provided, however, that Beneficiary, or any purchaser at a trustee's or sheriff's sale or any successor owner of the Property

shall not be: [P] (i) liable for any act or omission of a prior landlord . . .; [P] (ii) subject to any offsets or defenses which Tenant might have against any prior landlord . . .; [P] . . . [P] (iv) bound by any Agreement or modification of the Lease made without the written consent of Beneficiary." (Italics added.)

[2]We affirmed the portion of the judgment finding that Henrichs did not slander Valley View's title, particularly since we found that Henrichs's security interest in the Balboa lot was not extinguished under the Valley View and FDIC settlement agreements.

[3]In its tentative decision, which the trial court specified would become its statement of decision if no timely objections were raised, the court stated: "The fact that neither the FDIC nor Capital Bank are parties in this action does not mean the court cannot ascertain the parties' intent from the evidence presented. It is clear to me that neither Capital Bank, the FDIC, nor any of the parties ever contemplated that the Balboa [lot] was meant to secure the promissory note once the final subdivision map was approved and the lots legally split into the Chatsworth and Balboa lots. Capital was looking only to the Chatsworth lot as security for its loan and that was the FDIC's interest as well."

"The Ground Lease together with the Subordination/NonDisturbance and Attornment Agreement establishes the intent of the parties, GPA, Valley View and Capital Bank, that the construction loan provided by Capital Bank was intended to be secured by the Chatsworth parcel only and that the Balboa parcel was to be separated from the original parcel of land and conveyed to plaintiff, Valley View.

Capital Bank, GPA and Valley View all benefited from going forward with the deal prior to the legal split of the one lot into the Chatsworth and Balboa lots. This was near the end of the big real estate boom and, as Mr. Gelman explained, time was of the essence. . . . [P] When the Ground Lease and Subordination/Attornment Agreements were recorded with the County Recorder's Office it provided constructive notice to all third parties as well as actual notice to the parties themselves of this intent."

[4]Henrichs argued in the appellants' opening brief only that reformation of the FDIC settlement agreement was precluded. Henrichs did not argue in the opening brief that the extrinsic evidence presented by Valley View was insufficient to establish that the parties' true intention in entering the various contracts was that the Balboa lot would be reconveyed to Valley View free and clear of all liens and encumbrances, including the Capital note and deed of trust. That argument first appears in appellants' reply brief.

[5]We find it appropriate to consider in this appeal the denial of Henrichs's motion for summary adjudication (itself not an appealable order), as the appeal was taken from the entry of final judgment in favor of the cross-complainants after their cross-motions for summary judgment were granted.

Filed 1/22/2003
CASE NO. PC 019940Y
SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES, NORTH VALLEY DISTRICT

VALLEY VIEW DEVELOPMENT, etc.
Plaintiff,

vs.

BLAHA CONSTRUCTION & DEVELOPMENT, etc., et al., Defendants.

AND RELATED CROSS-ACTION.

JUDGMENT AFTER COURT TRIAL
Hon. L. Jeffrey Wiatt

TO THE COURT AND ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS AT LAW:

This cause came on regularly for trial on September 30, 2002, in Department "J" of the Los Angeles Superior Court, San Fernando Judicial District, the Honorable L. Jeffrey Wiatt, presiding, sitting without a jury, a jury having been waived by the parties. Plaintiff, Valley View Development, appearing by attorney Barry R. Edwards of Spiegelman and Edwards and Defendants, John Henrichs and Anne Henrichs, appearing by F. Glenn Nichols of the Law Offices of F. Glenn Nichols. Evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the court having made and caused to be

filed its written Statement of Intended Decision After Court Trial.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff, Valley View Development, a corporation, shall have judgment against defendants, John Henrichs and Anne Henrichs, on the First, Second, Third, Sixth and Seventh Causes of Action. Plaintiff dismissed the Fourth and Fifth Causes of Action with prejudice at the conclusion of the trial. The Court on its own motion dismissed the Eighth Cause of Action in light of the ruling on the other causes of action and especially the Second and Third Causes of Action. No money damages are awarded to plaintiff pursuant to the Second and Third Causes of Action.

2. Plaintiff, Valley View Development, is declared by the Court to be the rightful owner of the Balboa parcel free and clear of the claims of the Henrichs as assignees of the Capital Bank/FDIC Promissory Note and Deed of Trust.

3. The beneficial interests of Randy Carpenter and Blaha Construction and Development, a California corporation, in the Capital Bank Promissory Note, and all of their lien interest as beneficiaries under the Capital Bank Deed of Trust, have been previously extinguished in accordance with the Order Determining Good Faith Settlement filed in this matter on April 17, 2000.

4. Further, the interests of Randy Carpenter

and Blaha Construction and Development, a California corporation, in the estate held by them in the Balboa Lot have been previously reconveyed to Valley View Development, a California corporation, in accordance with the Order Determining Good Faith Settlement filed in this matter on April 17, 2000.

5. Defendants, John Henrichs and Anne Henrichs, are ordered to execute and deliver to plaintiff, Valley View Development, a Partial Reconveyance of the Capital Bank Deed of Trust, formally removing their lien interest against the Balboa Lot, more fully described as:

> Lot 2 of Tract 47539, in the City and County of Los Angeles, State of California, as per map recorded in Book 1183, pages 61 and 62 of maps, in the Official Records of said County, which property is commonly known and described as 10668 Balboa Boulevard, Granada Hills, California.

6. In the event that defendants, John and Anne Henrichs, fail to execute and deliver said reconveyance to Valley View's legal counsel, Barry Edwards, Esq., within ten days following the execution and filing of this Judgment, then the Clerk of the Los Angeles Superior Court is directed to execute and deliver said reconveyance per ex parte order of this Court upon the application of plaintiff, Valley View Development.

7. Plaintiff, Valley View Development, to have costs pursuant to a memorandum of costs summary and any applicable motions thereon as filed by plaintiff in this action.

10/07/02
PCO19940
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

VALLEY VIEW DEVELOPMENT
vs
BLAHA CONSTRUCTION & DEVELOPMENT, et al

HONORABLE L. JEFFREY WIATT JUDGE

RULING ON SUBMITTED MATTER

DECISION

The Court having taken under submission, on October 2, 2002, the decision on the court trial in this matter, now issues its tentative decision as follows:

The old adage "you can't get something for nothing" is what explains this case. When looked at from this vantage point of the Henrichs, motive, this seemingly complex case becomes simple in its analysis.

The Henrichs want the court to validate their effort to get something for nothing. This the court will not do. There will be no "something for nothing," no windfall, no unjust enrichment. Judgment will be for plaintiff and against defendants on the first, second, third, sixth and seventh causes of action. As for the 8th cause of action for recission, the court will dismiss it on its own motion in light of the ruling on the other causes of action, especially the second and third.

The court has considered the evidence received at trial and read and considered the parties' respective

trial briefs and plaintiffs' brief regarding the "law of the case."

The Henrichs "purchased" a 22.38% share of the promissory note secured by deed of trust from the FDIC relating to the Chatsworth lot. The sole intent of Blaha, the Henrichs and Carpenter in purchasing this note was to remove the debt on the Chatsworth property to allow for sale of the remaining condominiums. Nothing further was contemplated. The last thing in anyone's minds was acquisition of an interest in the Balboa lot. Mr. Henrichs testified that he did not know what collateral secured the note at the time that he acquired an interest in it. He did nothing to learn what collateral was attached to it at the time, and he did not speak to anybody except to Mr. Blaha, who told him at the time that he wanted him to participate that the Balboa parcel was not the incentive, but that the condominiums were the targets to generate a return on their investment. And in fact, what transpired was that the interest was transferred to the three participants -- Blaha, the Henrichs, and Carpenter, for approximately forty cents on the dollar, or $300,000. They eventually foreclosed on the condominiums themselves, and split those assets among those three beneficiaries, with the Henrichs selling two condos for approximately $200,000 on their investment of approximately $67,000. The Henrichs position is that they would not part with their ",interest" in the Balboa lot because that was worth, according to their counsel's statement in argument of $400,000. In essence, the Henrichs are trying to get something for nothing. That was never anyone's intent and to find that way would unjustly enrich them. Such a windfall was never contemplated and the court will not sanction it.

In and around 1990, plaintiff was the title owner of a parcel of land in the City of Granada Hills, California. This single parcel included property commonly known as 16940 Chatsworth Street and 10668 Balboa Boulevard, which ultimately would become what the parties refer to as the Chatsworth and Balboa lots, respectively.

Prior to August of 1990, a tentative tract map that subdivided the Chatsworth and Balboa properties had been filed with the City of Los Angeles with the intent of separating the two parcels for future development.

In and about August 1990, defendant, Granada Plaza Associates Ltd., a California Limited Partnership (GPA) was formed for the purpose of purchasing and developing the Chatsworth property only. Michael Blaha of Blaha Construction & Development, Inc. was the general partner, and Randy Carpenter and defendant John Henrichs were among the limited partners with Valley View. Blaha, Carpenter and Henrichs and/or their construction companies were involved in the planning, development and construction of the Chatsworth parcel. John Henrichs was the primary framing contractor for the planned construction project. GPA's only reason for existence was to build condominiums on the Chatsworth property and then sell them. That's all it ever wanted to do. That's all it ever intended to do in the relationship that it had with Valley View and itself.

The final tract map had not yet been recorded separating the two parcels and it was anticipated that this process would take some additional time. Time was

of the essence for all involved to get the project rolling to take advantage of the real estate market's upward trend. So it was in everyone's interest to proceed with the project on the assumption that the final tract map would be approved and the two lots would be coming into existence. To this end, Valley View agreed to convey the entire single parcel to GPA with the reservation for itself of a ninety-nine (99) year ground lease on the Balboa property (the Ground Lease). The Ground Lease was entered into on December 31, 1990 and provided that Valley View would lease the Balboa parcel for One Dollar ($1.00) per month. The Ground Lease further provided an option to purchase the Balboa parcel for the sum of One Dollar ($1.00) after a final tract map had been recorded separating the two parcels into legal lots. The Ground Lease provided that at the close of the purchase escrow, Landlord (GPA) shall execute and deliver to Tenant (Valley View) a grant deed "free and clear of all liens, encumbrances . ..and other matters of record, except those existing as of the date of this Lease...."

The Ground Lease provided for the opportunity of the Landlord to place an encumbrance on the fee interest in the property provided that any trust deed beneficiary agree to enter into a Non Disturbance Agreement with Tenant. At the time of the creation of the Ground Lease, the Capital Bank construction loan and Deed of Trust had not been recorded against the Landlord's real property.

In furtherance to the intent of the limited partnership, GPA, on or about January 1991, entered into a loan agreement with Capital Bank for the purpose of providing construction funds to develop the

Chatsworth parcel. The loan agreement was secured by a Deed of Trust against what was then still the one property that would eventually become the Chatsworth and Balboa parcels. This document was recorded on January 3, 1991. However, prior to the recording of the Deed of Trust by the bank, Capital Bank, GPA and Valley View entered into a Subordination, Non-Disturbance and Attornment Agreement which provided that the beneficiary (Capital Bank) or any such successor owner of the Property will not disturb the possession of Tenant (Valley View) and will perform and be bound by all of the obligations imposed on the Landlord (GPA) by the Ground Lease. This Subordination, Non-Disturbance and Attornment Agreement was recorded with the County Recorder's Office on January 3, 1991.

Subsequently, in January 1992, approximately one year after the recordation of the aforementioned subordination agreement, the Final Map subdividing the Chatsworth and Balboa parcels was recorded. This Map was executed by Blaha on behalf of GPA together with Capital Bank among others. Pursuant to the Ground Lease and with the intent that GPA then transfer and convey free and clear title to the Balboa parcel to Valley View, GPA executed and recorded its Grant Deed in fee simple to Valley View on January 15, 1992. GPA remained the owner in fee simple of the Chatsworth parcel which was now a separate and distinct legal parcel of land known as 16940 Chatsworth Street.

Subsequently, at the beginning of 1996, plaintiff obtained a preliminary title report on the Balboa property in order to locate financing for the development of that property. The 1994 earthquake had

destroyed the sole improvement on the parcel which required the tenant to vacate the premises and the building to be torn down. Upon receipt of the preliminary title report, plaintiff discovered that the Capital Bank construction loan trust deed remained of record against the property. Demand was made of GPA to clear such lien and its failure to do so prompted the filing of this lawsuit in 1997.

Valley View Is Entitled to Reform the FDIC Settlement Agreement

The court finds that plaintiff is entitled to reformation of the FDIC agreement to recite the true intent of the parties that Valley View was to benefit from the FDIC agreement.Nothing in that agreement would adversely affect the parties by declaring that Valley View should be a beneficiary as it would only add to the clarification that Valley View, GPA and the FDIC intended to end their relationship over the Balboa and Chatsworth lots.

The FDIC Settlement Agreement provides in paragraph 2 that the Obligors and the FDIC (including their respective representatives, predecessors, successors and assigns) release each other "from any and all claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities of any kind or nature...with respect to the Note, Guarantees and Deed of Trust...." If the Balboa property was originally intended to be a part of the collateral for the GPA obligation by the bank, then by the date of the FDIC settlement, both GPA and the FDIC were bound by the Ground Lease and Attornment Agreement. Thus the FDIC could not after succeeding to the interest of the bank thereafter take any action against the Balboa

property or its fee owner, Valley View for it had confirmed and cancelled any such claim in the Balboa property as collateral even though it had not expressly mentioned that parcel in the release and settlement agreement. This leads to the only conclusion possible that the Agreement contemplated that no claims be made against the Balboa parcel under the Capital Bank loan obligation.

The rights, if any, acquired in the Capital Bank Note and Deed of Trust by Blaha, Carpenter and Henrichs were acquired as assignees of the FDIC through GPA's right as a party to the FDIC Agreement and paragraphs 2 and 9 of said Agreement specifically make the release applicable to them to the same extent as if they were the FDIC. (See Salaman v. Bolt (1977) 74 Cal. .App. 3d 907, 919; Norman v. Berney (1965) 235 Cal. App. 2d 424, 434 and Dockrey v. Gray (1959) 172 Cal. App. 2d 388, 390-91 (assignment did not create greater rights in the assignee than were held by the assignor). The fact that neither the FDIC nor Capital Bank are parties in this action does not mean the court cannot ascertain the parties' intent from the evidence presented. It is clear to me that neither Capital Bank, the FDIC, nor any of the parties ever contemplated that the Balboa was meant to secure the promissory note once the final subdivision map was approved and the lots legally split into the Chatsworth and Balboa lots. Capital was looking only to the Chatsworth lot as security for its loan and that was the FDIC's interest as well.

Paragraph 8 of the FDIC Settlement Agreement allows that agreement to be urged as a complete defense to any claims arising out of any of the released matters. Pursuant to Civil Code Sections 2 941 (a) and (b) , the holders of the Capital Bank Deed of Trust were

required to execute a certificate of discharge or reconveyance of the deed within 30 days from the satisfaction of the mortgage. The FDIC Settlement Agreement and inclusive release, together with the prior Attornment Agreement, served as the satisfaction of the note obligation as far as the Balboa parcel and its fee owner, Valley View, is concerned. Valley View is entitled to reform the FDIC Agreement to recite that the Balboa property is released from the Capital Bank loan collateral and that the FDIC and/or its successors and assigns shall execute a reconveyance formally removing the lien against title.

Breach of Contract and Specific Performance.

Based upon the reformation, Valley View shall prevail on the breach of contract and specific performance causes of action. This follows from the reformation of the agreement.

Valley View Is Entitled to Quiet Title in the Balboa Property and to a Declaration of Court Declaring the Title to Be Free and Clear of the Capital Bank Loan and Trust Deed.

The Ground Lease together with the Subordination/NonDisturbance and Attornment Agreement establishes the intent of the parties, GPA, Valley View and Capital Bank, that the construction loan provided by Capital Bank was intended to be secured by the Chatsworth parcel only and that the Balboa parcel was to be separated from the original parcel of land and conveyed to plaintiff, Valley View.

Capital Bank, GPA and Valley View all benefitted from going forward with the deal prior to the legal split of the one lot into the Chatsworth and Balboa lots. This was near the end of the big real estate boom and, as Mr. Gelman explained, time was of the essence. Had they all waited until the ultimate approval of the tract map, the delay would have killed the deal.

When the Ground Lease and Subordination/Attornment Agreements were recorded with the County Recorder's Office it provided constructive notice to all third parties as well as actual notice to the parties themselves of this intent. When GPA executed, delivered and recorded its Grant Deed to the Balboa property to Valley View, this also provided constructive and actual notice to any third parties and to all of the parties and GPA's limited partners that GPA was complying with its obligation pursuant to the agreements with Valley View and Capital Bank. Thereafter, with knowledge of the transfer of the Balboa property by Grant Deed to Valley View, Capital Bank took no further action and exercised no rights over the Balboa parcel or its fee owner, Valley View, with regard to the construction loan, even though the terms of the promissory note were modified and amended several times between February 1992 and June 1993. These facts alone justify plaintiff's right to title of the Balboa property free and clear of the Capital Bank deed of trust.

Then in November of 1995, Valley View's principal, Marc Gelman, entered into a Settlement Agreement with the FDIC further supporting the Valley View and GPA agreements and understanding that the Balboa parcel had been transferred free and clear of the Capital Bank/FDIC loan. As far as GPA

was concerned, whether the bank or the FDIC had in fact recorded a partial reconveyance of the secured lien for the Balboa parcel or not made no difference to GPA and its limited partners. The original understanding about securing the Capital Bank loan was that it was only to be subject to the Chatsworth parcel. Once there had been an official tract map subdividing the two parcels into legal lots, GPA would own and control only the Chatsworth parcel and GPA would be obligated to transfer title to the Balboa parcel to Valley View free and clear of all liens pursuant to its previously executed agreement (Ground Lease).

The FDIC had not considered the Balboa parcel as security because it was aware of and bound by the Ground Lease and Attornment Agreement of its predecessor, Capital Bank (See the FDIC Creditor Claim filed in the GPA Bankruptcy). Accepting a compromise of the outstanding GPA debt in the settlement agreement without making any claim to the value of the Balboa parcel clearly supports the understanding of the FDIC, GPA and Valley View's principal in 1995 that only the Chatsworth parcel was subject to the construction loan's lien.

In addition, GPA commenced a bankruptcy under Chapter 11 of the United States Bankruptcy Code in 1995 in which GPA failed to claim that the Balboa parcel was an equitable or actual asset of GPA or that it was securing a debt obligation owed to its creditor Capital Bank/FDIC. GPA was legally obligated to disclose this fact in its bankruptcy Summary of Schedules, Disclosure Statement and Plan of Reorganization.

Furthermore, when the FDIC filed its Creditor Claim in Bankruptcy along with the appraisals of the secured collateral claimed against the loan obligation, the FDIC did not include any mention of the Balboa parcel nor its value at the time. Since the FDIC did not consider the Balboa property as collateral for the loan, the Henrichs' as the FDIC's assignees under the Note and Deed of Trust could not claim any greater rights. During argument, Henrichs' counsel made the statement that the value of the Henrichs' purported interest in the Balboa lot was $400,000. Had the FDIC thought that it had an interest in the Balboa lot that was worth anywhere near $400,000, they would not have sold the note for $300,000. This is just further evidence of the understanding and intent of the parties that the Balboa lot was not even a blip on the radar screen of the transaction.

Equity Supports a Finding That Valley View Is Entitled to Free and Clear Title to the Balboa Parcel against Defendants.

Basic concepts of equity provide relief for Valley View in this action. From the outset, all parties intended for Valley View to own the Balboa parcel free and clear as of the time of the exercise of the Option pursuant to paragraph 10 of the Ground Lease. Capital Bank knew this as well, as reflected by it having signed off on the Final Map subdividing the Balboa and Chatsworth properties, The language that GPA inserted in the Grant Deed early on in 1992 conveying the Balboa parcel to Valley View, regarding the fact that the Grant Deed was a reconveyance following a satisfaction of a debt, provides further proof of the parties' intention. There was simply no logical reason

for Valley View to accept the Grant Deed in lieu of its Ground Lease unless it was to acquire the Balboa parcel free and clear of any liens. Prior to execution of the Grant Deed by GPA, Valley View had a ninety-nine (99) year lease at the rate of One Dollar ($1.00) per month (Twelve Dollars -$12.00 a year). The remaining lease term was ninety-eight (98) years. As a ground lessee, Valley View was free to build upon or further encumber the ground-leased property and, regardless of what happened to the Capital Bank loan, the Attornment Agreement executed by the borrower, GPA and the lender, Capital Bank, ensured that Valley View's interest would be left intact so long as it made those nominal rent payments. It thus only made sense to take title to the Balboa parcel if Valley View could do so free and clear of the Capital Bank Deed of Trust. When GPA executed the Grant Deed, the partners of GPA, including Mr. Henrichs, intended precisely that and what Valley View believed had occurred. If Valley View was misled by GPA and/or its partners, then that would give rise to claims for reformation and declaratory relief which are exactly what is before this Court now.

He who seeks equity must do equity.

Valley View has performed its obligations under all of the agreements applicable between the various parties and the Henrichs further confirm and admit this fact by their statements that there are no violations or breaches of the FDIC Agreement by Valley View or its principal, Marc Gelman. (See, Responses to Form Interrogatories by John and Anne Henrichs filed as Exhibits to Marc Gelman's Motion for Summary Judgment heard August 13, 2002, of which the court

takes judicial notice pursuant to the request in plaintiff's trial brief). Having done equity in all of its conduct with the defendants, Valley View is entitled to equity from this Court.

Defendants' claim to rights under the assigned FDIC Note and Deed of are based upon unsupported and undocumented conclusions. As plaintiff suggests and the court concludes, this was all just wishful thinking. Defendants had paid a compromised sum to the FDIC to obtain release of the Chatsworth parcel and its condominium improvements from the secured lien; and then defendants sold those units for a tidy profit. Defendants want to gain an unjust enrichment by seeking to take the value of the Balboa parcel from Valley View to further profit from the deal. Nothing in the conduct of the Henrichs defendants amounts to equity under the facts and circumstances of this action, and thus they may not receive equity from this Court.

Declaratory Relief

There are certain presumptions on evidence that favor Valley View. Recitals in written instruments are presumptively true as between the parties. See Evidence Code Section 622. One whose duty it was to convey real property to a particular person or entity is presumed to have actually conveyed such title. See Evidence Code Section 642. Thus since the Grant Deed was required to be executed and delivered to Valley View pursuant to the Option in the Ground Lease, and since such conveyance was to be free and clear of the Capital Bank lien, it should be presumed that GPA did transfer and convey the property free and clear of this lien at the time it executed and recorded the Grant

Deed. Based upon the law and equity, Valley View, is entitled to a finding and declaration by this Court that it is the rightful owner of the Balboa parcel free and clear of the claims of the Henrichs and their predecessors, GPA and the Capital Bank/ FDIC.

D'Oench Duhme Doctrine

This doctrine of 12 U.S. Code 1823 has no application in this case. There were no "side deals or secret arrangements which might mislead bank examiners" or anyone else. As stated previously, the intent of the parties that the Balboa lot was to be made free and clear of the encumbrance of the promissory note and deed of trust was clear from the outset. The FDIC knew this and was not misled by any type of side deal or secret arrangement.

Law of the Case

Defendants continued to argue their contentions regarding the "law of the case" at trial as they did in various pretrial motions. Defendants take too broad an approach with regard to the opinion of the Second District Court of Appeal. Defendants contend that the appellate court determined that the intent of the parties was not to release the lien, that this is the law of the case, and that plaintiff should be precluded from asserting any theory which relies upon the intent of the parties other than the intent "determined" by the court of appeal. As was previously stated by this court, the appellate decision merely addressed what was not the expressed intent of the settlement agreements. The actual intent of the parties was not addressed by the appellate court. This court has considered all of the

evidence, including testimony of witnesses Gelman and Blaha and has determined from all of the evidence that the true intention of the parties was that the Balboa lot was to be relieved as security for the promissory note once the property was split into two lots. The issues on appeal involved the interpretation of the written documents. At trial, the court was involved with taking evidence on what the parties' true intent was, apart from the written documents. Accordingly, the law of the case does not preclude plaintiff from asserting theories based on the intent of the parties and/or from establishing the parties' actual contractual intention through other evidence. To hold otherwise would result in an absurd result where defendants are unjustly enriched.

Money Damages

There was no evidence presented as to what monetary damages were suffered, if any, by plaintiffs as to the second and third causes of action. In the second amended complaint there are allegations as to damages due to the cloud on the title to the Balboa lot that resulted in plaintiffs being unable to finance the property for purposes of development. However, there is no evidence to support these allegations and therefore no money damages are awarded to plaintiff in this action.

Statement of Decision

The court's Tentative Decision shall become the Statement of Decision unless, within 10 days of mailing hereof, a party specifies on one or more controverted issues or makes proposals not covered in the Tentative

Decision. Any party requesting a Statement of Decision must timely comply with applicable statutes and rules of court. In the event there is a timely request for a statement of decision, plaintiff is directed to prepare one in a manner not inconsistent with this tentative decision, and plaintiff to submit a proposed judgment.

Filed 8/17/2001
NOT TO BE PUBLISHED
B143541
(Super. Ct. No. PCO19940Y)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR

VALLEY VIEW DEVELOPMENT,
Plaintiff and Appellant,
v.
JOHN HENRICHS et al.,
Defendants and Appellants.

APPEALS from a judgment of the Superior Court of Los Angeles County, Jerold A. Krieger, Judge. Henrichs appeal reversed; Valley View appeal affirmed. Law Offices of F. Glenn Nichols and F. Glenn Nichols; Hunt, Ortmann, Blasco, Palffy & Rossell and Richard E. Blasco for Defendants and Appellants. Buchalter, Nemer, Fields & Younger, Abraham Colman, and G. Forsythe Bogeaus for Plaintiff and Appellant.

INTRODUCTION

This dispute involves enforcement of a deed of trust against real property. The trial court by summary adjudication quieted title to the property in plaintiff Valley View Development, a California corporation (Valley View). By nonjury trial the court held, however, that defendants John and Anne Henrichs (Henrichs)[1] did not slander Valley View's title, because Henrichs had a qualified privilege exercised in good

faith to assert a competing claim to the property as assignee of a deed of trust. Both parties appeal from portions of the subsequent judgment. On the main appeal, Henrichs contends the trial court misinterpreted legal documents and erroneously concluded Henrichs's trust deed lien on Valley View's property was not enforceable. We agree with Henrichs and reverse that portion of the judgment that quiets title in Valley View. By way of cross-appeal, Valley Viewcontends the trial court should have found Henrichs's claim was asserted in bad faith and constituted slander of title. We affirm the portion of the judgment finding that Henrichs did not slander Valley View's title.

FACTUAL AND PROCEDURAL BACKGROUND

The appeal by Henrichs is from that portion of the judgment, based on the trial court's prior order of summary adjudication, quieting title to "the Balboa lot" in Valley View's favor. The parties generally agree there are no triable issues of material fact, and that the issues on appeal involve interpretation of the written documents, a question of law for this court's independent review. (Milazo v. Gulf Ins. Co. (1990) 224 Cal.App.3d 1528, 1534.) Authentication of the legal documents and a description of the background facts were provided by the declaration. of Marc Gelman in support of Valley View's motion; Gelman's statements were largely undisputed, and of course there is no dispute what the legal documents said. We recite the facts either from the parties' separate statements based on Gelman's declaration, or from the documents themselves.

The Property

Gelman is the president of Valley View. Valley View owned a lot in Granada Hills at the intersection of Balboa Boulevard and Chatsworth Street. The parties refer to it as the "Original" lot. Its legal description in the trust deed is lot 2 of tract 22411. It was planned the Original lot would be subdivided into the "Balboa" lot and the "Chatsworth" lot; as of August 1990, a tentative tract map (tentative tract 47539) was on file. The Balboa lot, commonly known as 10668 Balboa Boulevard, was lot 2 of tentative tract 47539, comprising the southwesterly portion of the Original lot. Apparently a dry cleaning business was on the Balboa lot.

Granada Plaza Associates, Ltd., a California limited partnership (GPA), was formed for the purpose of purchasing the Chatsworth lot from Valley View and developing a condominium project thereon, commonly known as 16940 Chatsworth Street. Michael Blaha was the general partner of GPA as well as a limited partner. Other limited partners included Randy Carpenter, John Henrichs, and Valley View.[2]

In December 1990, Valley View sold the Original lot to GPA. The entire Original lot was included, rather than just the Chatsworth lot intended for condominium development, because at that time the tract map for subdividing the Original lot had not yet been recorded. As partial consideration for the Original lot, GPA executed and delivered to Valley View a note for $73,147 and a deed of trust against the Original lot (the Valley View note and deed of trust).

Because no final tract map subdividing the

property was recorded when Valley View sold the Original lot to GPA, Valley View and GPA entered into a written ground lease in December 1990, leasing the Balboa lot to Valley View as tenant for 99 years. Rent was $1 per month, and for $1 GPA granted Valley View an option to purchase the Balboa lot for $1, after recordation of a final tract map for tentative tract 47539. Any existing improvements were Valley View's sole property; Valley View had sole discretion to remove them, and GPA was entitled to no compensation for them. GPA agreed that Valley View would have quiet enjoyment of the premises "without hindrance on the part of [GPA] or any trust deed beneficiary. [Par.] [GPA] shall have the right to place an encumbrance upon its fee interest in the property providing any trust deed beneficiary agrees to enter into a Non-Disturbance Agreement with [Valley View]."

The Capital Bank Construction Loan and Deed of Trust

In order to finance the construction of condominiums on the Chatsworth lot, GPA obtained a construction loan of $3,985,000, from Capital Bank. To secure the loan, GPA executed and delivered to Capital Bank a deed of trust (the Capital loan and deed of trust). The deed of trust was against the Original lot. The deed of trust was made as of December 31, 1990, and was recorded on January 3, 1991. In addition, Gelman and Blaha each delivered to Capital Bank on December 31, 1990, their personal guaranties of the Capital loan.

On January 2, 1991, GPA, Valley View, and Capital Bank entered a "subordination, non-disturbance

and attornment agreement," that was recorded on January 3, 1991. The agreement recites that it affects the Original lot, lot 2 of tract 22411. The lease was declared to be subordinate to the mortgage and the lien thereof. Valley View acknowledged the lease was assigned to Capital Bank as security for the mortgage, and that in the event of a default under the mortgage, and Capital Bank demanded rent of Valley View, Valley View would accept Capital Bank as landlord. "In the event of foreclosure of the Mortgage, or upon a sale of the Property pursuant to the trustee's power of sale contained therein, or upon a transfer of the Property by conveyance in lieu of a foreclosure, then: [Par.] (a) Non-Disturbance. So long as Tenant [Valley View] complies with this Agreement and is not in default under...the Lease, the Lease shall continue in full force and effect as a direct lease between the succeeding owner of the Property and Tenant...subject to all of the...conditions of the Lease, for the balance of the term of the Lease. . . Beneficiary [Capital Bank], or any such successor owner of the Property, will not disturb the possession of Tenant, and will perform and be bound by all of the obligations imposed on the Landlord [GPA] by the Lease provided, however, that Beneficiary, or any purchaser at a trustee's or sheriff's sale or any successor owner of the Property shall not be [Par.] (i) liable for any act or omission of a prior landlord...;[Par.] (ii) subject to any offsets or defenses which Tenant might have against any prior landlord; [Par.] . . . [Par.] (iv) bound by any Agreement or modification of the Lease made without the written consent of Beneficiary." "Nothing contained in this Agreement shall be construed to derogate from or in any way impair or affect the lien and, charge or provisions of the Mortgage." "This Agreement shall inure to the benefit

of the parties hereto, their respective successors and permitted assigns . . ."

Subdivision of the Balboa and Chatsworth Lots

A final tract map subdividing the Original lot into the Balboa and Chatsworth lots was "executed by Michael Blaha and Capital Bank and recorded on or about January 15, 1992, by Blaha as General Partner of GPA and was signed off by [Gelman and] Capital Bank at that time."

On January 14, 1992, GPA by grant deed conveyed the Balboa lot (lot 2 of tract 47539) to Valley View. The deed was recorded on January 15, 1992.

Earthquake Damages the Condominiums on the Chatsworth Lot

On January 17, 1994, the condominiums that had been constructed on the Chatsworth lot were severely damaged by the Northridge earthquake.

On March 10, 1994, the Federal Deposit Insurance Corporation (FDIC) took over Capital Bank and thus acquired the Capital loan and deed of trust.

In January 1995, various controversies arose among Valley View, GPA, and Blaha. Valley View demanded payment from GPA of the Valley View $73,147 note. GPA filed for relief under chapter 11 of the Bankruptcy Code.

GPA, through Blaha, and Valley View, through Gelman, held settlement discussions on the disputes between them. These resulted in the execution on

November 8, 1995, of the Valley View settlement agreement.

At about the same time, FDIC entered into a settlement agreement with GPA, Blaha, and Gelman (the FDIC settlement agreement).

Valley View Settlement Agreement

The Valley View settlement agreement is among GPA, Michael Blaha, individually, Valley View, and Marc Gelman, individually. It recites that GPA was formed to acquire the land at 16940 Chatsworth Street and develop a multi-unit condominium complex for sale of the individual units to third parties; that GPA had sold 26 of the 36 units when the complex suffered severe earthquake damage in January 1994; that GPA filed for bankruptcy protection under chapter 11; that Valley View holds a note from GPA for $73,147; that Capital Bank held a construction loan secured by a trust deed; that FDIC had acquired Capital Bank's interest; that GPA has agreed with FDIC to purchase the Capital Bank loan for $300,000, payable on November 9, 1995;fn3 and that GPA; Blaha, Valley View, and Gelman have settled their disputes regarding the condominium complex in the manner set forth.

The agreement provides that Valley View withdraws as a limited partner of GPA and agrees to "fully reconvey the Valley View Deed of Trust and cancel the Valley View Note. The indebtedness evidenced and secured by such documents. . . shall be deemed satisfied in full and no amounts whatsoever relating to such indebtedness shall be owed to Valley

View or any of its direct or indirect beneficial owners." It further provides that Valley View shall deposit a lien release, the original Valley View note and deed of trust, and a full reconveyance deed.

GPA "shall purchase or cancel, as GPA elects in its sole discretion, the Capital Bank Construction Loan from the FDIC. In connection therewith, the guaranties from Blaha and Gelman to Capital Bank shall be cancelled and rendered of no further force or effect whatsoever. GPA shall cause the original guaranty executed by Gelman to be stamped 'Cancelled' and returned to Gelman."[3]

Gelman shall deposit sums (totaling $29,661) toward certain expenses, for the benefit of Blaha and GPA, and GPA shall deposit $300,000 to be used to purchase the Capital Bank loan. GPA shall dismiss its bankruptcy,[4]

Releases. GPA and Blaha agree "to release and discharge Valley View and Gelman and each and all of their officers, directors, agents, representatives, affiliates, attorneys, principals, associates, employees, successors and assigns, and each of them, from any and all claims, demands, liabilities, actions and causes of action which GPA and/or Blaha has or hereafter may have, or claim or hereafter may claim to have, against Valley View and/or Gelman, by reason of any damages or injuries whatsoever incurred or sustained by GPA and/or Blaha and occasioned directly or indirectly by any action or omission of Valley View and/or Gelman, respectively, arising out of or in connection with the transactions contemplated by the Partnership Agreement, the Capital Bank Construction Loan, the Valley View Loan and/or any transactions related to any such matters, including the business affairs of GPA

. . . ." In the same language, Valley View and Gelman agree to release and discharge GPA and Blaha. The parties waive the limitations on general releases contained in Civil Code section 1542.

The parties agree to execute all further instruments necessary to carry out the agreement.

"This Agreement and the terms and provisions hereof shall inure to the benefit of and be binding upon the parties hereto and their permitted successors and assigns."

FDIC Settlement Agreement

At about the same time, FDIC, as successor to Capital Bank, entered a settlement agreement and mutual release with GPA, Blaha, and Gelman. The agreement refers to GPA, and Blaha and Gelman individually (who had executed guaranties of the Capital loan), as "Obligors," and FDIC and Capital Bank collectively as FDIC. It recites, "The parties desire to settle any and all claims of FDIC against GPA, and its partners or guarantors, and to cancel or, at the option of GPA, assign the obligations under" the note secured by deed of trust between GPA and Capital Bank, "to cancel the obligations under any and all personal guaranties of GPA's obligations under the Note," and "to remove or, at the option of GPA, assign any and all encumbrances caused by the recording of" the Capital deed of trust.

"[T]he sole consideration for executing this Agreement and for releasing said claims, demands, sums of money, actions, rights, causes of action, debts,

obligations and liabilities is the payment by Obligors of $300,000, and the cancellation and return or, at the option of GPA, assignment of the Note, Guaranties and Deed of Trust. FDIC hereby agrees to deliver or, at the option of GPA, assign the original Note, Guaranties and Deed of Trust at or about the time of the execution of this Agreement. At the option of GPA., rather than effecting cancellation, FDIC will assign the Note and Deed of Trust to any party designated by GPA. In any event, FDIC shall cancel and deliver to counsel to GPA and to Gelman the Guaranties."

Releases. "The Obligors and FDIC hereby release, discharge and acquit each other and their respective representatives, including, without limitation, agents, employees, limited partners, general partners, servants, attorneys, assigns, predecessors and successors, subsidiaries and affiliates, and each of them, of and from any and all claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities of any kind or nature whatsoever which each has, may have had or claim to have had, or now have or claim to have, or hereafter may have or assert to have with respect to the Note, Guaranties and Deed of Trust or any claim or cause of action that could have been asserted by the Obligors or FDIC in connection therewith." The parties waive the limitations on general releases contained in Civil Code section 1542.

"This Agreement shall inure to the benefit of the Obligors and FDIC and shall be binding upon the Obligors and FDIC and their representatives, and successors."

Assignment of the Capital Note and Deed of Trust

On November 16, 1995, FDIC was paid the $300,000 settlement sum. At the same time, FDIC executed an assignment of the Capital note and deed of trust: "For value received, the FDIC[] hereby *assigns and transfers* all of its right, title and interest in and to the Deed of Trust, but without recourse, representation or warranty, expressed or implied, to the following persons (collectively, the 'Assignees'), and their successors and assigns, as tenants in common: (i) Blaha Construction and Development, Inc., as to a 66.43% interest in the Deed of Trust; (ii) John and Ann Henrichs, as to a 22.38% interest in the Deed of Trust; and (iii) Randy Carpenter, as to a 11.19% interest in the Deed of Trust." (Italics added.) In the same manner and respective percentages, FDIC assigned the Capital note of $3,985,000, "together with all sums of money due and to becomedue on the Note."'

Notice of Trustee's Sale

In January 1996, Gelman, on behalf of Valley View, demanded that "defendants"[5] reconvey the lien of the Capital trust deed to the extent of the encumbrance on the Balboa property. The defendants refused to do so, and instead in October 1998 caused a notice of trustee's sale to be recorded with respect to the entire Original lot including the Balboa property.

The notice of trustee's sale listed the property to be sold as eight designated condominium units at 16940 Chatsworth Street, and the property at 10668 Balboa Boulevard.

Valley View obtained a preliminary injunction against foreclosure on the Balboa property, pending resolution of Valley View's, claims in this suit.

FDIC's assignees foreclosed on the Chatsworth property for $648,000.

This Action

Valley View filed this action with 10 causes of action including to quiet title to the Balboa property. Valley View moved for summary adjudication of issues on its third, fifth, eighth, and ninth causes of action for specific performance of the Valley View and FDIC settlement agreements, for declaratory relief, and to quiet title. Valley View contended that as a result of the Valley View and FDIC settlement agreements, Henrichs had no enforceable security interest in the Balboa lot.

The trial court granted Valley View's motion. Its order on summary adjudication holds: under the Valley View settlement agreement, GPA released Valley View and Gelman from any claims or liabilities related to the Capital loan, and any acquisition by GPA and assignment to assignees is subject to the release given to Valley View by GPA and exonerates the Balboa property; under the FDIC settlement agreement, FDIC the creditor released Gelman, including any of Gelman's affiliates, and this language thereby releases Valley View.

Valley View dismissed its other causes of action except slander of title. The court tried this cause of action without a jury. The court held: slander of title

requires malice, it is the unprivileged publication (in this case giving notice of a trustee's sale) of an untrue assertion of title; given the difficulty of interpreting the legal documents affecting the validity of the lien, Valley View failed to prove that Henrichs acted unreasonably and in bad faith in asserting the enforceability of the trust deed.

The trial court subsequently rendered a judgment incorporating (1) its prior order on summary adjudication, adjudging that Valley View is the sole owner in fee simple of the Balboa property and that Henrichs has no interest in the Balboa property, and (2) its determination by trial that Valley View take nothing against Henrichs for slander of title.

Henrichs appeals from that portion of the judgment in Valley View's favor on the third, fifth, eighth, and ninth causes of action. Valley View appeals from that portion of the judgment in favor of Henrichs on the tenth cause of action for slander of title.[6]

DISCUSSION OF THE APPEAL

The Capital trust deed provided the lender (Capital Bank, later FDIC) with a secured interest in the entire Original lot, as security for payment of the Capital note. Henrichs, as assignee of FDIC's interest in the Capital note and trust deed, seeks to enforce that interest by foreclosing on the entire Original lot. Valley View contends the security is no longer enforceable, at least as against the Balboa portion of the Original lot. The trial court agreed with Valley View's arguments that as a result of the FDIC and/or Valley View settlement agreements, the underlying debt

represented by the Capital note was extinguished, and therefore the trust deed securing that debt is unenforceable. Henrichs attacks the reasoning of Valley View and the trial court. Henrichs basically contends: (1) the FDIC settlement did not extinguish the Capital note by satisfaction; rather, FDIC assigned its interests in the note and trust deed to Henrichs (among others) and (2) the Valley View settlement agreement released GPA's and Valley View's claims against each other but did not operate to extinguish GPA's obligation to Capital. We agree, and therefore we reverse the judgment that quiets title in Valley View.

A contract must be interpreted to give effect to the intention of the parties, ascertainable from the wording of the whole written instrument if possible, or by reference to the circumstances under which it was made. (Civ. Code, §§ 1636, 1639,1641,1647.)

Interpretation of the FDIC Settlement Agreement

Valley View contended in its points and authorities below and reiterates in its respondent's brief that, (in Valley View's words) FDIC "released all of the Capital Obligors and their privies in exchange for $300,000, which was paid. Where as here payment is made in an amount which satisfies [sic] the lien, the deed of trust is extinguished, and is no longer enforceable, [Citing Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1235, for its proposition that [a] security interest cannot exist without an underlying obligation, and therefore a mortgage or deed of trust is generally extinguished by...payment."] Because the lien was satisfied [sic], the holders of the Capital Deed

of Trust were *required* to execute a certificate of discharge or full reconveyance of the deed."

This argument is. not supported by the record or the language of the FDIC settlement agreement. Valley View's own separate statement asserted as an undisputed fact that at the time of the Valley View settlement (which was the same time as the FDIC settlement), the outstanding amount due on the Capital note was over $700,000. Payment of only $300,000 did not "satisfy" the obligation.

This surrounding circumstance and the language of the FDIC settlement show that the settlement was a compromise agreement between FDIC and the Obligors whereby FDIC accepted $300,000, released claims against GPA the debtor, released and extinguished the personal guaranties of Blaha and Gelman, and assigned the note and deed of trust to the assignees. It appears that the assignees, Blaha Construction and Development, Inc., John and Anne Henrichs, and Randy Carpenter, provided the $300,000 that enabled GPA to make the agreement with FDIC, and in return the assignees received the Capital note and trust deed.[7] Valley View's argument that the underlying debt was extinguished lacks merit.

Valley View next argued below and reiterates on appeal that even if the releases in the FDIC settlement agreement were between FDIC and the Obligors, the assignees have no greater rights than the FDIC because paragraph 2 of the FDIC settlement expressly extends. to the parties' "assigns," and paragraph 9 of the FDIC settlement states the agreement shall be binding on the Obligors and FDIC

and their representatives, and successors." This argument is inconsistent with the record and the language of the agreement that expressly contemplates the assignment to the assignees, for value received ($300,000), of the Capital loan and trust deed. The trial court erroneously adopted Valley View's fallacious argument.

Valley View argued, and the trial court agreed, that FDIC released Gelman, and the release extended to "affiliates," and that Valley View may be considered an affiliate of Gelman, its president, therefore a release of Gelman and his affiliates is a release of Valley View's Balboa property from the security of the trust deed. This argument ignores the context that Gelman had personally guaranteed Capital's loan to GPA, and one of the purposes of the FDIC agreement was to cancel the obligations under all personal guaranties of GPA's obligations. Gelman and his affiliates are released from Gelman's personal guaranty, but this does not mean Valley View's Balboa property is released from the security of the Capital note and trust deed, which the agreement expressly assigns rather than extinguishes. The FDIC agreement was with GPA, and with Blaha and Gelman individually, as guarantors, not with Valley View.

The trial court thus erred in concluding that the FDIC settlement agreement resulted in extinguishing the security of the Capital note and deed of trust that were assigned by FDIC to Henrichs and others.

Interpretation of the Valley View Settlement Agreement

FDIC assigned its interests in the Capital note and trust deed to the assignees, including Henrichs. Valley View contended nevertheless that GPA "acquired" Capital Bank's interest, if only for an instant, by purchase, because GPA had the option and sole discretion to specify to whom the Capital note and trust deed should be assigned. The trial court adopted Valley View's arguments that GPA thus "acquired" the Capital note and trust deed from FDIC, and that because GPA had released all claims against Valley View in the Valley View settlement agreement, any security in the Balboa property acquired by the assignees, was an interest GPA had waived as to Valley View.

The Valley View settlement agreement does not have the effect claimed by Valley View. FDIC assigned *its* interests in the Capital note and trust deed to the assignees, including Henrichs. In the Valley View settlement agreement, GPA released Valley View from all liabilities which GPA has or may hereafter have by reason of damages or injuries sustained or occasioned *by any action of Valley View* arising from the partnership agreement, the Capital Bank construction loan the Valley View loan, or any transactions relating to any such matters.[8] The Capital note and trust deed arose from GPA's obtaining a loan from Capital Bank to construct condominiums on the Chatsworth lot. The Valley View settlement agreement had nothing to do with *Capital Bank's* secured interest in the Original lot. Capital Bank was not a party to the Valley View settlement agreement. Although GPA in the Valley View settlement agreement released Valley View from claims of GPA arising *from Valley View's conduct*, the agreement did not release Valley View's property, the Balboa lot, from Capital Bank's security interest, even

assuming for discussion that GPA momentarily acquired Capital Bank's interest.

CONCLUSION ON THE APPEAL

Valley View's argument that the security interest in the Balboa property assigned to Henrichs by the FDIC is unenforceable by virtue of the FDIC and Valley View settlement agreements is not persuasive. The trial court erred in granting summary adjudication to Valley View quieting title to the Balboa property in Valley View and holding that Henrichs has no interest in the Balboa property. The judgment in favor of Valley View and against Henrichs on the third, fifth, eighth, and ninth causes of action, based on the order of summary adjudication, should be reversed.

Henrichs requests that this judgment be reversed with directions to enter judgment in favor of Henrichs. We disagree. Ordinarily the reversal of a summary judgment does not lead automatically, and without further trial proceedings, to a judgment for the other party. Although Henrichs filed a motion for summary judgment, the appellate record does not contain all the papers relevant thereto, and the trial court did not rule on it, other than to treat it as moot.

DISCUSSION OF THE CROSS-APPEAL

After Valley View *won* its motion for summary adjudication, the court *tried* Valley View's tenth cause of action for slander of title. Valley View *lost* the trial *even though* it had won the summary, adjudication. The court issued a tentative decision stating that "having reviewed the testimony and evidence," it found that Henrichs's assertion of the security interest was not

unreasonable and was in good faith, and Henrichs "had a qualified privilege as rival claimants and such privilege was not defeated by the purported knowledge that they might have had, either actual or constructively."

On its cross-appeal Valley View contends Henrichs had notice of the invalidity of Henrichs's claim, and the trial court erred in finding Henrichs acted in good faith. Even had we not reversed the other portion of the judgment, Valley View could not prevail on its cross-appeal, because Henrichs's good faith was a. question of fact for the trial court to determine. Valley View is attempting to attack a factual finding as being unsupported by any substantial evidence, and fails to provide a record of the "testimony and evidence" relied upon by the trial court in finding that Henrichs acted in good faith. (Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal. 4th 121,132; Ballard v. Uribe (1986) 41 Cal.3d 564, 574-575.) In light of the substantial evidence rule (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 359, pp. 408-409), that portion of the judgment finding that Henrichs did not slander Valley View's title, based on good faith, would be affirmed even if the other portion of the judgment quieting title in Valley View were also affirmed. The portion of the judgment in favor of Henrichs as to slander of title should certainly be affirmed in light of our conclusion on the main appeal that Henrichs's security interest in the Balboa lot was not extinguished under the Valley View and FDIC settlement agreements.

DISPOSITION

That portion of the judgment in favor of Valley View on

its third, fifth, eighth, and ninth causes of action is reversed. That portion of the judgment in favor of Henrichs on Valley View's tenth cause of action is affirmed. Henrichs shall recover costs on both appeals.

Footnotes

Fn1To avoid repetitive references to "Mr. and Mrs. Henrichs" or "the Henrichses" or to awkward plural possessives, we refer to them collectively in the singular as "Henrichs," with the singular possessive "Henrichs's."

fn2Gelman's declaration stated Valley View was a limited partner of GPA. Henrichs pointed out, and Valley View admitted, that the list of limited partners attached to the limited partnership agreement lists "Mark Gellman" as a limited partner but not "Valley View." However, the Valley View settlement agreement also recites that Valley View was a limited partner of GPA.

fn3At the time of the Valley View settlement agreement, the outstanding principal due on the Capital note was over $700,000.

fn4GPA's bankruptcy was dismissed on November 8, 1995.

Fn5The defendants below were Blaha Construction & Development, Inc., Michael Blahs, GPA, John and Ann Henrichs, and Randy Carpenter. Henrichs contends the correct reference should be to the assignees under the FDIC assignment (i.e., Blaha Construction and Development, Inc., Henrichs, and Carpenter).

fn6 The other defendants below (Blaha Construction & Development, Inc., Michael Blaha, GPA, and Randy Carpenter) are not parties to this appeal.

fn7This is corroborated by other evidence in the record on appeal. According to the declarations of Michael Blaha, Michael Ackerman, and John Byrne submitted by the other defendants below in opposition to Valley View's motion for summary adjudication, FDIC was selling and assigning the loan at a discount for $300,000; GPA made a request of its partners for capital contributions to buy the Capital loan at a discount, and only Blaha Construction and Development, Inc., John and Anne Henrichs, and Randy Carpenter contributed the $300,000, in the percentages indicated in the FDIC assignment.

fn8The release provision of the Valley View settlement agreement is quoted fully at pages 8-9, ante.

DECLARATION OF MARY L. RICHE REGARDING PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

I, Mary L. Riche, declare as follows:

1. I am an attorney at law and, at all times mentioned herein, I have been and now am a Senior Attorney for the Federal Deposit Insurance Corporation as receiver of Capital Bank of California (the "FDIC") in its offices located in Dallas, Texas.

2. The matters stated herein are known to me of my personal knowledge, and I could testify competently thereto if sworn as a witness.

3. This declaration is being filed in connection with Plaintiff's Ex Parte Application for a Temporary Protective Order filed concurrently herewith.

4. The FDIC was appointed receiver of Capital Bank of California, Los Angeles, California, on June 18, 1993. On November 16, 1995, acting as receiver, the FDIC executed the Settlement Agreement and Mutual Release that is the subject of this litigation.

5. The California Superior Court (Valley View v. Henrichs, Case No. PC019940) has entered a judgment reforming the Settlement Agreement to provide that it was the FDIC's intention to release that tract of land referred to as the Balboa Lot. The FDIC was never made a party to the state court action.

6. Claims against the FDIC as receiver to attempt to reform the FDIC Settlement Agreement to provide that the FDIC agreed to release the Balboa property, or to otherwise seek a determination of rights with respect to the Capital Bank Note and Deed' of Trust, are governed exclusively by the mandatory administrative claims process. 12 U.S.C. § 1821(d). Until exhaustion of the administrative process, no court has subject matter jurisdiction over the claim. 12 U.S.C. § 1821(d)(13)(D).

7. If the claim is denied, the claimant may bring suit against the FDIC in the United States District Court where the failed institution's principal place of business is or the United State's District Court for the District of Columbia. 12 U.S.C. § 1821 (d)(6).

8. Valley view never filed a claim with the FDIC.

9. The FDIC does not object to the issuance of a temporary restraining order and preliminary injunction to preserve the status quo and prevent the distribution of the approximately $464,000.00 being held by Timcor Financial, pending a determination by this court regarding the validity of the state court judgment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day June, 2004, at Dallas, Texas.

STATEMENT OF JURISDICTION

The United States District Court for the Central District of California ("District Court") lacked subject matter jurisdiction over the claims of John and Anne Henrichs against the Federal Deposit Insurance Corporation ("FDIC") as Receiver for Capital Bank of California ("Receivership") because (1) their claim for money damages is moot and (2) they failed to timely exhaust their administrative remedies as required by 12 U.S.C. § 1821(d)(6)(A). The District Court entered final judgment on all claims on August 17, 2004 (RE 276-87)[1]. The Henrichs timely filed their notice of appeal on August 25, 2004 (RE 288). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Is the Henrichs' claim for money damages moot because the Receivership they sued has been terminated, there are no assets from which a money judgment could ever be satisfied and, thus, the District Court can grant no relief?

2. Did the District Court lack jurisdiction over the Henrichs' claim for money damages against the Receivership because the Henrichs did not pursue the FDIC's mandatory administrative claims process in time to permit the payment of their claim?

3. Do the jurisdictional limitations in the FDIC's mandatory administrative claims process and anti-injunction statute apply to actions -- like the state court action against the Henrichs, seeking no relief from the FDIC?

STATEMENT OF THE CASE

This case involves a dispute between the Henrichs, on the one hand, and Valley View Development ("Valley View") and Mark Gelman, on the other, over whether a deed of trust ("Deed of Trust") owned by the Henrichs encumbered a parcel of real property referred to as the Balboa Lot owned by Valley View. The dispute had been fully litigated in state court before this action was filed.

The Henrichs had acquired the Deed of Trust in 1995 as a result of a settlement agreement ("FDIC Settlement Agreement") among the FDIC, a borrower and two guarantors of a 1990 Capital Bank of California construction loan, which went into default. Pursuant to this agreement, the FDIC agreed to accept $300,000 in settlement of monies owed on the borrower's promissory note ("Note") and to assign the Note and Deed of Trust to parties designated by the borrower (RE 78). As pertinent to this case, the FDIC assigned a 22.38% interest to the Henrichs (RE 85).

The dispute over the lien arose in 1996. Valley View filed a state court action and in January, 2003 obtained a final judgment (1) reforming the FDIC Settlement Agreement to reflect the contracting parties' intent to release a lien on the Balboa Lot and (2) ordering the Henrichs to execute a release of the lien (RE 148-50 163).

In the instant federal District Court action, the Henrichs sought (1) to set aside as void the final state court judgment ordering them to release the lien or, in the alternative, (2) to recover from the FDIC money

damages for the Receivership's purported breach of contract in assigning that lien to the Henrichs (RE 193).

The District Court denied the Henrichs' motions for a temporary restraining order and preliminary injunction and dismissed the entire action (RE 287). The District Court found that the state court did not exceed its jurisdiction in adjudicating Valley View's claims, in ordering the reformation of the FDIC Settlement Agreement, or in issuing injunctive relief against the Henrichs (RE 286-87). Because the case did not involve issues and claims within the exclusive jurisdiction of the federal courts, the District Court found that the state court judgment was not void (RE 287). Under the *Rooker-Feldman* doctrine, the District Court found that it lacked "subject matter jurisdiction over this action which impermissibly seeks review of the judgment of a state court" (RE 287).

The Henrichs filed a notice of appeal and this Court determined that the appeal would be handled pursuant to Ninth Circuit Rule 3-3 (RE 288-89).

STATEMENT OF FACTS

On December 31, 1990, Capital Bank of California ("Capital Bank") made a $3.9 million construction loan to Granada Plaza Associates, Ltd. ("GPA"), which was secured by a Deed of Trust on property in Granada Hills, California (RE 32-64, 165).[2] The FDIC was appointed receiver of Capital Bank on June 18, 1993, succeeding to Capital Bank's interest in the construction loan, Note and Deed of Trust (RE 181, 279). After the loan went into default, the FDIC entered into a settlement with the borrower (GPA) and

the two loan guarantors (Gelman and Blaha) in November, 1995 (RE 77-84). Under the FDIC Settlement Agreement, the borrower and guarantors agreed to pay the FDIC $300,000 and, in exchange, the FDIC agreed to cancel/return the Note, Deed of Trust and guaranties or, at the option of GPA, assign the Note and Deed of Trust to any party designated by GPA and cancel/return the guaranties (RE 78).

Pursuant to GPA's instructions, the FDIC assigned the Note and its interest under the Deed of Trust to various parties designated by GPA, including a 22.38% interest to the Henrichs (the "Assignment") (RE 85). The FDIC assigned this interest "without recourse, representation or warranty, expressed or implied" (RE 85). The Henrichs were not signatories to the Assignment.

In 1996, a dispute arose concerning whether property of Valley View (the Balboa Lot) was encumbered by the Deed of Trust, now owned by the Henrichs (and the other assignees)(RE 279). Valley View filed an action in state court against the Henrichs, among others, to quiet title to the Balboa Lot (RE 279). The state trial court entered a judgment in Valley View's favor quieting title, which was reversed on appeal and remanded for further proceedings (RE 103, 108).

The FDIC was never made a party to this state court action and Valley View did not file any claim for damages with the Receivership (RE 181). Because the Receivership had distributed all available assets to pay outstanding and approved claims pursuant to a regulatory priority scheme, the Receivership was terminated on January 1, 2001.[3]

In the continuing state court action, Valley View filed a motion to amend its complaint in December 2001, requesting that the court reform the FDIC Settlement Agreement to reflect the contracting parties' intent to release any lien on the Balboa Lot (RE 169). The state court granted this request and ordered the Henrichs to "execute and deliver to [Valley View] a Partial Reconveyance of the [Deed of Trust], formally removing their lien interest against the Balboa Lot." (RE 148-50, 169, 179). The California Court of Appeal affirmed this judgment and the California Supreme Court denied the Henrichs' petition for further review (RE 176, 201).

On March 31, 2004, the Henrichs sent a letter to the FDIC claiming damages for the FDIC's purported breach of the Assignment (Br. 15; RE 190, 201). The Receivership has been terminated and no action has been taken on this claim.

On June 16, 2004, the Henrichs filed the instant federal action in the District Court (RE 194). In their complaint, the Henrichs charge that the judgment was void because the state court lacked jurisdiction over Valley View's claims relating to the lien (RE 188-89, 193). Alternatively, the Henrichs maintain that the state court judgment ordering the release of the lien rendered the FDIC in breach of the Assignment (RE 189-90). They assert that the FDIC "failed to disclose to the Henrichs that it had previously, according to the State Court Judgment, agreed with GPA, Gelman and Blaha to release and reconvey the Balboa Lien..." (RE 189-90). The Henrichs also requested a temporary restraining order and/or preliminary injunction to prohibit the distribution of funds from Valley View's

sale of the property after the release of the Balboa Lien (RE 193-94).

Before the FDIC filed an answer, the District Court denied the motion for temporary restraining order, held a hearing on the request for a preliminary injunction, and dismissed the action for lack of subject matter jurisdiction (RE 287)[4]. The District Court found that the parties did not intend for the Balboa Lot to be encumbered by the Deed of Trust; that the FDIC was aware that Valley View exercised an option to purchase the Balboa Lot free of encumbrances prior to the appointment of the Receivership; and that, as a result, a lien on the Balboa Lot was not an asset acquired by the FDIC from Capital Bank (RE 285-86). The District Court concluded that "the grant of exclusive federal jurisdiction under 12 U.S.C. § 1821(d)(6) does not apply to claims concerning the Balboa Lot. Therefore, the [state court] did not exceed its jurisdiction in adjudicating Valley View's claims." (RE 286).

The District Court also found that the state court did not exceed its jurisdiction by ordering the reformation of the FDIC Settlement Agreement (RE 287). The District Court observed that the state court did not order the FDIC to reconvey the Deed of Trust in violation of the anti-injunction provision of 12 U.S.C. § 1821(j) "but rather issued injunctive relief only as against the Henrichs." (RE 287).

The Henrichs filed a timely notice of appeal (RE 288-89).

SUMMARY OF ARGUMENT

The District Court properly dismissed the Henrichs'

breach of contract claim against the FDIC. The District Court lacked jurisdiction to adjudicate this claim because it is moot and was not timely presented in the FDIC's mandatory administrative claims process.

A claim is moot when it presents no controversy for which effective relief can be granted. Three years before the Henrichs first asserted their breach of contract claim against the FDIC, the Receivership had wound up its affairs, distributed its assets and had been terminated. Because there are no assets from which a money judgment could be satisfied, the Henrichs' claim is moot and the District Court lacked jurisdiction.

In addition, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989) precludes jurisdiction over any claim against an FDIC receiver unless an administrative claim was timely filed. Because the Henrichs filed no claim with the FDIC before the Receivership was wound up, no court can now adjudicate their claim.

Finally, the FDIC's mandatory administrative claims process and anti-injunction statute did not deprive the state court of jurisdiction over Valley View's claims against the Henrichs. The claims process applies only to claims against the FDIC as receiver and not to other parties. In addition the anti-injunction statute does not protect assignees of receivership assets where there is no harm to the FDIC receivership.

ARGUMENT I.

I. STANDARD OF REVIEW

Subject matter jurisdiction is a question of law reviewed *de novo*. Sahni v. American Diversified Partners, 83 F.3d 1054, 1057 (9th Cir. 1996), *cert. denied*, 519 U.S. 1091(1997).

II. THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE THE CLAIM AGAINST THE FDIC

The Henrichs maintain that the District Court improperly dismissed their breach of contract claim against the FDIC, asserting that there were no jurisdictional defects relating to this claim (Br. 40)[5]. In the complaint, the Henrichs sought damages for breach of the Assignment entered into by the Receivership (RE 85, 189-90, 193). The Receivership, however, has been wound up and there are no assets from which any money judgment in favor of the Henrichs could be satisfied.

These facts deprived the District Court of jurisdiction over the Henrichs' claims, for two reasons. First, because the claim is moot, the District Court lacked jurisdiction under U.S. Const. art. III, § 2, cl. 1. Second, the statutory claims process created by FIRREA deprives all courts of jurisdiction over any claim against a receivership not filed in accordance with that process. Since the Henrichs asserted their claim too late to participate in the claims process, no court can now adjudicate their claim.[6]

A. The Claim Against The FDIC Is Moot

The Henrichs first asserted claims for money damages against the Receivership in March, 2004 (Br. 15; RE 190, 201). Well before these claims were asserted, the Receivership had wound up its affairs, had distributed all assets in the receivership estate to claimants pursuant to priorities established by law and had been terminated on January 1, 2001. Accordingly, because there is neither an entity against which the liability can be asserted nor any assets from which a money judgment could ever be satisfied, the District Court could grant no relief to the Henrichs. Their claim is moot.

By statutory mandate, the FDIC functions in two separate capacities. As receiver, the FDIC recovers on a failed bank's assets and uses the recovered amounts to pay creditors, with any remaining balance going to stockholders; in its corporate capacity, the FDIC regulates open banks and insures bank deposits. FDIC v. Bernstein, 944 F.2d 101, 106 (2d Cir. 1991). The FDIC in its corporate capacity is not liable for any act or omission of the FDIC in its receivership capacity and vice versa. FDIC v. Roldan Fonseca, 795 F.2d 1102, 1109 (1st Cir. 1986) (citations omitted) ("'Corporate' FDIC and 'Receiver' FDIC are separate and distinct legal entities.... Corporate FDIC is not liable for wrongdoings by Receiver FDIC.") Moreover, FDIC in its corporate capacity has not assumed any liability for the claim filed by the Henrichs after the termination of the Receivership.

In this case, therefore, the Henrichs can look only to the assets of the terminated Capitol Bank Receivership to satisfy their claim. First Indiana Fed. Sav. Bank v.

FDIC, 964 F.2d 503, 507 (5th Cir. 1992) ("Congressional policy requires that creditors of failed institutions look only to the assets of the institution for recovery of their losses, and not to the taxpayers."); Village S. Joint Venture v. FDIC, 733 F. Supp. 50, 51 (N.D. Tex. 1990) ("FIRREA provides that the FDIC's maximum liability to any person having a claim against the receiver or the failed institution for which the FDIC is acting as receiver is the amount the claimant 'would have received if the [FDIC] had liquidated the assets of such institution.' 12 U.S.C. § 1821(1)(2)").

"Mootness is, of course, a threshold jurisdictional issue." Sea-Land Serv., Inc. v. International Longshoremen's & Warehousemen's Union, 939 F.2d 866, 870 (9th Cir. 1991). "A claim is moot where the issues presented. . . do not present a controversy as to which effective relief can be granted." Greenpeace v. National Marine Fisheries Serv., 80 F. Supp.2d 1137, 1151 (W.D.Wash. 2000), citing Northwest Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988). "We cannot take jurisdiction over a claim as to which no effective relief can be granted." United States v. Geophysical Corp., 732 F.2d 693, 698 (9th Cir. 1984). Thus, "[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." Northwest Envtl. Def. Ctr., 849 F.2d at 1244.

Applying these principles, courts have repeatedly found that claims against an FDIC receiver are moot when there are no assets from which a judgment could be satisfied. For example, in Adams v. RTC, 927 F.2d 348 (8th Cir.), cert. denied, 502 U.S. 815 (1991), the district court had dismissed common law fraud claims against the receiver as moot. The court of appeals

affirmed:

> To satisfy the case or controversy requirement of Article III of the Constitution, [plaintiff's] claimed injury must be redressable by a favorable judicial decision. . . . The Bank Board formally determined that the claims of subordinated debt holders like [plaintiff] are worthless. We are bound by the Bank Board's worthlessness determination in this proceeding. . . . The import of this determination is that FSLIC, as receiver for [the failed financial institution], will never have any assets with which to satisfy a common law fraud judgment. Under these circumstances, we follow the axiomatic principle that when "it [is] impossible for [a] court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment."

927 F.2d at 354 (citations omitted). See also, FDIC v. Kooyomjian, 220 F.3d 10, 15 (1st Cir. 2000) (worthlessness determination precludes any relief and renders claim moot). Where a receiver has been wound up and distributed all its assets, it is certain that subsequent claimants will never be able to recover anything on their claims.

In the instant case, the Receivership had distributed all of the failed bank's assets and had been terminated on January 1, 2001, three years before the Henrichs first raised their claim. As a result, the Henrichs cannot recover anything on this claim. Because the Henrichs' breach of contract claim against the FDIC is moot, the District Court lacked subject matter jurisdiction and properly dismissed this claim.

B. FIRREA Deprives The District Court Of

Jurisdiction Over The Henrichs' Claim Against The FDIC

Under the statutory claims process established by FIRREA, no court has jurisdiction over claims relating to any act or omission of the FDIC as a receiver not previously submitted to the receivership in accordance with that process. The claims process necessarily ends when the receivership is wound up. Because the Henrichs did not file an administrative claim before the Receivership was terminated, and thus did not proceed in accordance with the claims process, no court can now adjudicate their claims.

When Congress enacted the FIRREA in response to the financial institutions crisis, it fundamentally restructured the regulatory and receivership powers and duties of the federal banking agencies. One of the powers FIRREA provided to receivers was the power to determine claims and to disallow claims not proven to the receiver's satisfaction. To effectuate this power, Congress created a receivership claims procedure, in § 1821(d)(3) through (13) of Title 12 of the United States Code, to allow "the FDIC to quickly resolve many of the claims against failed financial institutions without unduly burdening the District Courts." H.R. Rep. No. 101-54(I), at 419 (1989), *reprinted* in 1989 U.S.C.C.A.N. 86, 215. This statutory claims procedure "strips all courts of jurisdiction over claims made outside the administrative procedures." Henderson v. Bank of New England, 986 F.2d 319, 320 (9th Cir.), *cert. denied*, 510 U.S. 995 (1993); *cf*, McCarthy v. FDIC, 348 F.3d 1075, 1079 (9th Cir. 2003).

A fundamental requirement of the claims procedures is that all claimants must file with the receiver any claim

they wish to assert against the failed institution or the receiver 12 U.S.C. § 1821(d)(5). If the claimant fails to file a claim by the established bar date, the claim is disallowed and "such disallowance shall be final." 12 U.S.C. § 1821(d)(5)(C)(i). No court has jurisdiction to entertain such a claim. A discretionary exception to this rule provides that the receiver may consider late-filed claims if the claimant did not receive notice of the receivership in time to file a claim by the bar date, "*and such claim is filed in time to permit payment of such claim.* " 12 U.S.C. § 182 1(d)(5)(C)(ii) (emphasis added). Pursuant to this discretionary exception, a claim must be filed before a receivership is terminated. With respect to any filed claim, the receiver has 180 days to investigate and determine whether to allow or disallow the claim. 12 U.S.C. § 1821(d)(5)(A). A claimant dissatisfied with the receiver's determination has 60 days from the earlier of denial of the claim or the expiration of the 180-day period in which to seek de novo adjudication of the claim. 12 U.S.C. § 1821(d)(6)(A).

Section 1821(d)(13)(D) only allows courts to exercise jurisdiction over claims against the failed bank and its receiver in accordance with the procedures in Section 1821(d):

Except as otherwise provided in this subsection, no court shall have jurisdiction over -

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as

such receiver; or

(ii) *any claim relating to any act or omission of such institution or the Corporation as receiver.*

12 U.S.C. § 182 1(d)(13)(D)(i) and (ii) (emphasis added).

This statute makes clear that the claims process applies both to pre-closing actions of the failed institution as well as to claims based on the post-receivership conduct of the receiver.[7] McCarthy, 348 F.3d at 1081. Although the original bar date obviously cannot bar claims arising or discovered after such date, the remaining requirements of § 1821(d)(3) - (13) continue to apply to such claims. Hudson United Bank v. Chase Manhattan Bank, 43 F.3d 843, 851 (3d Cir. 1994); Heno v. FDIC, 20 F.3d 1204, 1209 (1st Cir. 1994). One such requirement is that the claim be "filed in time to permit payment of such claim." 12 U.S.C. § 1821(d)(5)(C)(ii). Thus, a claim must be filed before the termination of a receivership.

In this case, the Henrichs asserted their claim that the Receivership had breached the Assignment fn8 for the first time in March, 2004 (Br. 15, RE 190, 201). The Receivership had already terminated on January 1, 2001, however, following the distribution of all of the Receivership's funds. These facts absolutely preclude any further payments to anyone by the Receivership. Since the Henrichs' claim relating to an act or omission of the Corporation as receiver was thus not filed in time to permit payment of such claim, the Henrichs plainly cannot now participate in the claims process. That being the case, FIRREA commands that no court shall have jurisdiction over the Henrichs' claim. Heno, 20 F.3d at 1207 ("Failure to participate in the

administrative claims review process . . . is a 'jurisdictional bar' to judicial review."). The claim was properly dismissed.

III. FIRREA'S MANDATORY CLAIMS PROCESS AND ANTI-INJUNCTION PROVISION APPLY ONLY TO MATTERS AFFECTING THE FDIC.

The Henrichs urge this Court to declare the state court judgment against them void because the state court lacked subject matter jurisdiction to enter that judgment (Br. 34-40, 52). They assert that, as assignees of Receivership assets, claims against them were subject to FIRREA's mandatory claims process in 12 U.S.C. § 1821(d)(3) through (13) and, thus, within the exclusive jurisdiction of the federal courts pursuant to 12 U.S.C. § 1821(d)(6) (Br. 27-28, 32-33, 39, 50-51). In addition, they assert that their status as assignees affords them the protections of FIRREA's anti-injunction provision in 12 U.S.C. § 1821(j) (Br. 28-31, 37). These assertions are incorrect.

The claims process applies only to claims against the FDIC as receiver and not to claims against other parties. Through FIRREA, Congress established an efficient and comprehensive process for administering claims brought against failed financial institutions and their receivers. The purpose of the claims process was to provide a centralized mechanism for resolving claims against the receivership estate without the delay and expense of litigation. Henderson, 986 F.2d at 320. By requiring that all claims against the insolvent institution or relating to acts or omission of the receiver be submitted to the receiver, the receiver is allowed an

initial opportunity to consider the claim and to determine whether or not it should be paid pursuant to the priorities established by statute and regulation. 12 U.S.C. § 1821(d)(3), (d)(5)(B), and (d)(5)D).

The very structure of the statutory claims provisions demonstrates that it deals only with claims **against a receivership** involving (1) acts or omissions of the failed financial institution or receivership and/or (2) assets of the receivership. The statutory provision dealing with claims arising pre-receivership refers only to a "claim against a depository institution", 12 U.S.C. § 1821(d)(5)(A)(i), and the **receiver** succeeds to the liability for valid claims against a failed financial institution, 12 U.S.C. § 1821(d)(2)(H)_ For claims arising post-receivership, the relevant statutory section provides that these claims must be filed "in time to permit payment of such claim." 12 U.S.C. § 1821(d)(5)(C)(ii)(II). This section envisions payment of meritorious claims against the **receiver** by the **receivership estate**. Thus, the claims process applies only to claims against a receivership.

In the state court action, the FDIC was not a party and there were no claims made against the Receivership. Accordingly, the claims process did not provide a basis for federal court jurisdiction in that action.[9]

Section 1821(j) is a jurisdictional provision that applies only to the FDIC. This Section prohibits a court from restraining or affecting "the exercise of powers or functions of the Corporation as conservator or a receiver." 12 U.S.C. § 1821(j). Thus, the court action must affect the interest of the FDIC. As the District Court observed, "[t]he [state court] did not order the

FDIC to reconvey the Capital Note and Trust Deed in alleged violation of 12 U.S.C. § 1821(j), but rather issued injunctive relief only as against the Henrichs."(RE 287). The District Court correctly concluded that the state court's order was not prohibited by Section 1821(j) (RE 287).

No authority cited by the Henrichs compels a different result. The Henrichs list numerous cases where courts have allowed assignees of FDIC receivership assets to take advantage of the FDIC's special defenses of federal holder in due course status, the FDIC's statute of limitations, and the *D'Oench Duhme* doctrine (Br. 35-40). In addition, the Henrichs point to authority which grants to assignees (who obtain an FDIC receivership asset during litigation) the benefit of continuing federal court jurisdiction, which was originally based on the FDIC's participation in the litigation as a party (Br. 39). This authority, however, does not support the Henrichs' assertions (1) that FIRREA's mandatory claims process applies to claims against them or (2) that FIRREA's anti-injunction provision protects assignees of receivership assets where there is no harm to the FDIC as receiver. Accordingly, the District Court properly rejected their claims of exclusive federal court jurisdiction.

CONCLUSION

For the foregoing reasons, the FDIC respectfully requests that the judgment of the District Court dismissing the instant action against the FDIC be affirmed.

Footnotes

fn1The abbreviation "RE" refers to the Excerpts of Record filed by the Henrichs.

fn2 Marc Gelman and Michael Blaha guaranteed the repayment of the loan (RE 278).

fn3 The FDIC published a notice of its intent to terminate the Receivership. *See* 64 Fed. Reg. 19,358 (Apr. 20, 1999).

Fn4In dismissing the action, the District Court did not discuss the breach of contract claims against the FDIC.

Fn5The abbreviation "Br" refers to the opening brief filed by the Henrichs.

fn6 In dismissing the instant federal action, the District Court did not discuss the Henrichs' breach of contract claim against the FDIC. A reviewing court, however, may affirm a district court judgment upon valid grounds not addressed by the court below. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 584 (9th Cir. 1993).

fn7 *E.g.*, Hudson United Bank v. Chase Manhattan Bank, 43 F.3d 843, 851 (3d Cir. 1994); Heno v. FDIC, 20 F.3d 1204,1209 (1st Cir. 1994); Stamm v. Paul, 121 F.3d 635, 642 (11th Cir. 1997); FDIC v. Scott, 125 F.3d 254, 259 (5th Cir. 1997).

fn8 In Sharpe v. FDIC, 126 F.3d 1147 (9th Cir. 1997), the court found that the statutory claims process did not apply to certain breach of contract claims against a receivership. That holding is limited to contracts entered into by the failed institution prior to the

appointment of a receiver where the FDIC as receiver subsequently breaches the contract instead of repudiating it as allowed by 12 U.S.C.§ 1821(e). McCarthy, 348 F.3d at 1078. By contrast, the Assignment in this case was signed by the Receivership after its appointment and was not eligible to be repudiated under 12 U.S.C. § 1821(e).

fn9 The Henrichs also maintain that the state court erroneously determined that 12 U.S.C. § 1823(e) did not apply in the state court action (Br. 51-52). Assuming *arguendo* that they are correct, this error would not deprive a court of jurisdiction. Section 1823(e) provides a special defense under FIRREA and is not a statutory grant of jurisdiction.

12 § 1821.

(d) Powers and duties of Corporation as conservator or receiver

(1) Rulemaking authority of Corporation

The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to—

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may (subject to the provisions of section 1831q of this title), as conservator or receiver—

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and

shareholders

The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be—

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver

The Corporation may (subject to the provisions of section 1831q of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions

The Corporation may, as receiver—

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under subsection (m) of this section or a bridge bank under subsection (n) of this section.

(G) Merger; transfer of assets and liabilities

(i) In general The Corporation may, as conservator or receiver—

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency No transfer described in clause (i)(II) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subsection (m) or (n) of this section) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations

The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

(I) Subpoena authority

(i) In general The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818 (n) of this title, and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of Board of Directors A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the

Resolution Trust Corporation under this subparagraph and section 1441a (b)(4) [3] of this title, only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii) Rule of construction This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 1820 (c) of this title.

(J) Incidental powers

The Corporation may, as conservator or receiver—

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this chapter,

which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector

In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

(3) Authority of receiver to determine claims

(A) In general

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall—

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books—

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims

(A) In general

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) Final settlement payment procedure

(i) In general In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final

settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii) Final settlement payment For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

(iii) Final settlement payment rate For purposes of clause (ii), the final settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in the place of insured depositors in each specific receivership.

(iv) Corporation authority The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims

(A) Determination period

(i) In general Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears—

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period

(i) In general Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if—

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims

(i) In general The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution—

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions No provision of this paragraph shall apply with respect to—

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (D)

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions Subject to paragraph

(12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims

(A) In general

Before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations

If any claimant fails to—

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such

period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims

(A) Administrative hearing

If any claimant requests review under this subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of title 5.

(B) Other review procedures

(i) In general The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims

(A) Establishment required

The Corporation shall establish a procedure for expedited relief outside of the routine claims process

established under paragraph (5) for claimants who—

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall—

(i) determine—

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of—

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in

accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing

(i) Statute of limitation tolled For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823 (e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823 (e)(2) [4] of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(C) Rulemaking authority of Corporation

The Corporation may prescribe such rules, including definitions of terms, as it deems appropriate to establish a single uniform interest rate for or to make payments of post insolvency interest to creditors holding proven claims against the receivership estates of insured Federal or State depository institutions following satisfaction by the receiver of the principal amount of all creditor claims.

(11) Depositor preference

(A) In general

Subject to section 1815 (e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

(B) Effect on State law

(i) In general The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of title 5.

(C) Accounting report

Any distribution by the Corporation in connection with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

(12) Suspension of legal actions

(A) In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed—

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required

Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall—

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no

court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823 (d)(1) of this title, the Corporation shall conduct its operations in a manner which—

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any

action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441a (b)(14) of this title), the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(C) Revival of expired State causes of action

(i) In general In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

(ii) Claims described A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

(15) Accounting and recordkeeping requirements

(A) In general

The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report

With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports

Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

(D) Recordkeeping requirement

After the end of the 6-year period beginning on the date the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with State housing finance authorities

(A) In general

The Corporation may enter into contracts with any State housing finance authority for the sale of

mortgage-related assets (as such terms are defined in section 1441a–1 of this title) of any depository institution in default (including assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider

In evaluating the disposition of mortgage related assets to any State housing finance authority the Corporation shall consider—

(i) the State housing finance authority's ability to acquire and service current, delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership or disposition of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

(17) Fraudulent transfers

(A) In general

The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision may avoid a transfer of any interest of an institution-affiliated

party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery

To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from—

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee

The Corporation or any conservator described in subparagraph (A) may not recover under subparagraph (B) from—

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph

The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be

superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11.

(18) Attachment of assets and other injunctive relief

Subject to paragraph (19), any court of competent jurisdiction may, at the request of—

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under this section or section 1822 or 1823 of this title); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision,

issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards

(A) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) State proceeding

If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph

(18) may be requested under the laws of such State.

(20) Treatment of claims arising from breach of contracts executed by the receiver or conservator

Notwithstanding any other provision of this subsection, any final and unappealable judgment for monetary damages entered against a receiver or conservator for an insured depository institution for the breach of an agreement executed or approved by such receiver or conservator after the date of its appointment shall be paid as an administrative expense of the receiver or conservator. Nothing in this paragraph shall be construed to limit the power of a receiver or conservator to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection

within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be—

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

(4) Leases under which the institution is the lessee

(A) In general

If the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) Payments of rent

Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall—

(i) be entitled to the contractual rent accruing before the later of the date—

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (i) of this section.

(5) Leases under which the institution is the lessor

(A) In general

If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in

possession

If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph—

(i) the lessee—

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

(6) Contracts for the sale of real property

(A) In general

If the conservator or receiver repudiates any contract (which meets the requirements of each paragraph of section 1823 (e) of this title) for the sale of real property and the purchaser of such real property under such contract is in possession and is not, as of the date of such repudiation, in default, such purchaser may either—

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession

If any purchaser of real property under any contract described in subparagraph (A) remains in possession of such property pursuant to clause (ii) of such

subparagraph—

(i) the purchaser—

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the depository institution under the contract; and

(ii) the conservator or receiver shall—

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) Assignment and sale allowed

(i) In general No provision of this paragraph shall be construed as limiting the right of the conservator or receiver to assign the contract described in subparagraph (A) and sell the property subject to the contract and the provisions of this paragraph.

(ii) No liability after assignment and sale If an assignment and sale described in clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described in subparagraph (A) or with respect to the real property which was the subject of such contract.

(7) Provisions applicable to service contracts

(A) Services performed before appointment

In the case of any contract for services between any person and any insured depository institution for which the Corporation has been appointed conservator or

receiver, any claim of such person for services performed before the appointment of the conservator or the receiver shall be—

(i) a claim to be paid in accordance with subsections (d) and (i) of this section; and

(ii) deemed to have arisen as of the date the conservator or receiver was appointed.

(B) Services performed after appointment and prior to repudiation

If, in the case of any contract for services described in subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section—

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

(C) Acceptance of performance no bar to subsequent repudiation

The acceptance by any conservator or receiver of services referred to in subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

(8) Certain qualified financial contracts

(A) Rights of parties to contracts

Subject to paragraphs (9) and (10) of this subsection and notwithstanding any other provision of this chapter (other than subsection (d)(9) of this section and section 1823 (e) of this title), any other Federal law, or the law of any State, no person shall be stayed or prohibited

from exercising—

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

(ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i); [5]

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more contracts and agreements described in clause (i), including any master agreement for such contracts or agreements.

(B) Applicability of other provisions

Subsection (d)(12) of this section shall apply in the case of any judicial action or proceeding brought against any receiver referred to in subparagraph (A), or the insured depository institution for which such receiver was appointed, by any party to a contract or agreement described in subparagraph (A)(i) with such institution.

(C) Certain transfers not avoidable

(i) In general Notwithstanding paragraph (11), section 91 of this title or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

(ii) Exception for certain transfers Clause (i) shall not apply to any transfer of money or other property in

connection with any qualified financial contract with an insured depository institution if the Corporation determines that the transferee had actual intent to hinder, delay, or defraud such institution, the creditors of such institution, or any conservator or receiver appointed for such institution.

(D) Certain contracts and agreements defined

For purposes of this subsection, the following definitions shall apply:

(i) Qualified financial contract The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph.

(ii) Securities contract The term "securities contract"—

(I) means a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, or any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or any option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(II) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such agreement within the meaning of such term;

(III) means any option entered into on a national

securities exchange relating to foreign currencies;

(IV) means the guarantee by or to any securities clearing agency of any settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, certificates of deposit, or mortgage loans or interests therein (including any interest therein or based on the value thereof) or option on any of the foregoing, including any option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option;

(V) means any margin loan;

(VI) means any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) means any combination of the agreements or transactions referred to in this clause;

(VIII) means any option to enter into any agreement or transaction referred to in this clause;

(IX) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this clause, except that the master agreement shall be considered to be a securities contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), (IV), (V), (VI), (VII), or (VIII); and

(X) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection

with any agreement or transaction referred to in this clause.

(iii) Commodity contract The term "commodity contract" means—

(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(II) with respect to a foreign futures commission merchant, a foreign future;

(III) with respect to a leverage transaction merchant, a leverage transaction;

(IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(V) with respect to a commodity options dealer, a commodity option;

(VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause;

(VII) any combination of the agreements or transactions referred to in this clause;

(VIII) any option to enter into any agreement or transaction referred to in this clause;

(IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master

agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or

(X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause.

(iv) Forward contract The term "forward contract" means—

(I) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than 2 days after the date the contract is entered into, including,[6] a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(II) any combination of agreements or transactions referred to in subclauses (I) and (III);

(III) any option to enter into any agreement or transaction referred to in subclause (I) or (II);

(IV) a master agreement that provides for an agreement or transaction referred to in subclauses (I), (II), or (III), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a forward contract under this

clause, except that the master agreement shall be considered to be a forward contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), or (III); or

(V) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (II), (III), or (IV), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

(v) Repurchase agreement The term "repurchase agreement" (which definition also applies to a reverse repurchase agreement)—

(I) means an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage-related securities (as such term is defined in the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]), mortgage loans, interests in mortgage-related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement;

(II) does not include any repurchase obligation under a participation in a commercial mortgage loan unless the

Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term;

(III) means any combination of agreements or transactions referred to in subclauses (I) and (IV);

(IV) means any option to enter into any agreement or transaction referred to in subclause (I) or (III);

(V) means a master agreement that provides for an agreement or transaction referred to in subclause (I), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a repurchase agreement under this clause, except that the master agreement shall be considered to be a repurchase agreement under this subclause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (III), or (IV); and

(VI) means any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in subclause (I), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

For purposes of this clause, the term "qualified foreign government security" means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development (as determined by regulation or order adopted by the appropriate Federal banking authority).

(vi) Swap agreement The term "swap agreement" means—

(I) any agreement, including the terms and conditions incorporated by reference in any such agreement,

which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option;

(II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(III) any combination of agreements or transactions referred to in this clause;

(IV) any option to enter into any agreement or transaction referred to in this clause;

(V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master

agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and

(VI) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in subclause (I), (II), (III), (IV), or (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such subclause.

Such term is applicable for purposes of this subsection only and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939 [15 U.S.C. 77aaa et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Securities Investor Protection Act of 1970 [15 U.S.C. 78aaa et seq.], the Commodity Exchange Act [7 U.S.C. 1 et seq.], the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000 [7 U.S.C. 27 to 27f].

(vii) Treatment of master agreement as one agreement

Any master agreement for any contract or agreement described in any preceding clause of this subparagraph (or any master agreement for such master agreement or agreements), together with all supplements to such

master agreement, shall be treated as a single agreement and a single qualified financial contract. If a master agreement contains provisions relating to agreements or transactions that are not themselves qualified financial contracts, the master agreement shall be deemed to be a qualified financial contract only with respect to those transactions that are themselves qualified financial contracts.

(viii) Transfer The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the depository institution's equity of redemption.

(E) Certain protections in event of appointment of conservator

Notwithstanding any other provision of this chapter (other than subsections (d)(9) and (e)(10) of this section, and section 1823 (e) of this title), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising—

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

(ii) any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts described in clause (i); [1]

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

(F) Clarification

No provision of law shall be construed as limiting the right or power of the Corporation, or authorizing any court or agency to limit or delay, in any manner, the right or power of the Corporation to transfer any qualified financial contract in accordance with paragraphs (9) and (10) of this subsection or to disaffirm or repudiate any such contract in accordance with subsection (e)(1) of this section.

(G) Walkaway clauses not effective

(i) In general Notwithstanding the provisions of subparagraphs (A) and (E), and sections 4403 and 4404 of this title, no walkaway clause shall be enforceable in a qualified financial contract of an insured depository institution in default.

(ii) Walkaway clause defined For purposes of this subparagraph, the term "walkaway clause" means a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of such party's status as a nondefaulting party.

(H) Recordkeeping requirements

The Corporation, in consultation with the appropriate Federal banking agencies, may prescribe regulations requiring more detailed recordkeeping by any insured depository institution with respect to qualified financial contracts (including market valuations) only if such insured depository institution is in a troubled condition (as such term is defined by the Corporation pursuant to section 1831i of this title).

(9) Transfer of qualified financial contracts

(A) In general

In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either—

(i) transfer to one financial institution, other than a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding—

(I) all qualified financial contracts between any person or any affiliate of such person and the depository institution in default;

(II) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

(III) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

(IV) all property securing or any other credit enhancement for any contract described in subclause (I) or any claim described in subclause (II) or (III) under any such contract; or

(ii) transfer none of the qualified financial contracts, claims, property or other credit enhancement referred to in clause (i) (with respect to such person and any affiliate of such person).

(B) Transfer to foreign bank, foreign financial institution, or branch or agency of a foreign bank or financial institution

In transferring any qualified financial contracts and related claims and property under subparagraph (A)(i),

the conservator or receiver for the depository institution shall not make such transfer to a foreign bank, financial institution organized under the laws of a foreign country, or a branch or agency of a foreign bank or financial institution unless, under the law applicable to such bank, financial institution, branch or agency, to the qualified financial contracts, and to any netting contract, any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts, the contractual rights of the parties to such qualified financial contracts, netting contracts, security agreements or arrangements, or other credit enhancements are enforceable substantially to the same extent as permitted under this section.

(C) Transfer of contracts subject to the rules of a clearing organization

In the event that a conservator or receiver transfers any qualified financial contract and related claims, property, and credit enhancements pursuant to subparagraph (A)(i) and such contract is cleared by or subject to the rules of a clearing organization, the clearing organization shall not be required to accept the transferee as a member by virtue of the transfer.

(D) Definitions

For purposes of this paragraph, the term "financial institution" means a broker or dealer, a depository institution, a futures commission merchant, or any other institution, as determined by the Corporation by regulation to be a financial institution, and the term "clearing organization" has the same meaning as in section 4402 of this title.

(10) Notification of transfer

(A) In general

If—

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

the conservator or receiver shall notify any person who is a party to any such contract of such transfer by 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver in the case of a receivership, or the business day following such transfer in the case of a conservatorship.

(B) Certain rights not enforceable

(i) Receivership A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(A) of this subsection or section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a receiver for the depository institution (or the insolvency or financial condition of the depository institution for which the receiver has been appointed)—

(I) until 5:00 p.m. (eastern time) on the business day following the date of the appointment of the receiver; or

(II) after the person has received notice that the contract has been transferred pursuant to paragraph (9)(A).

(ii) Conservatorship A person who is a party to a qualified financial contract with an insured depository institution may not exercise any right that such person has to terminate, liquidate, or net such contract under paragraph (8)(E) of this subsection or section 4403 or 4404 of this title, solely by reason of or incidental to the appointment of a conservator for the depository institution (or the insolvency or financial condition of

the depository institution for which the conservator has been appointed).

(iii) Notice For purposes of this paragraph, the Corporation as receiver or conservator of an insured depository institution shall be deemed to have notified a person who is a party to a qualified financial contract with such depository institution if the Corporation has taken steps reasonably calculated to provide notice to such person by the time specified in subparagraph (A).

(C) Treatment of bridge banks

The following institutions shall not be considered to be a financial institution for which a conservator, receiver, trustee in bankruptcy, or other legal custodian has been appointed or which is otherwise the subject of a bankruptcy or insolvency proceeding for purposes of paragraph (9):

(i) A bridge bank.

(ii) A depository institution organized by the Corporation, for which a conservator is appointed either—

(I) immediately upon the organization of the institution; or

(II) at the time of a purchase and assumption transaction between the depository institution and the Corporation as receiver for a depository institution in default.

(D) "Business day" defined

For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Disaffirmance or repudiation of qualified financial contracts

In exercising the rights of disaffirmance or repudiation

of a conservator or receiver with respect to any qualified financial contract to which an insured depository institution is a party, the conservator or receiver for such institution shall either—

(A) disaffirm or repudiate all qualified financial contracts between—

(i) any person or any affiliate of such person; and

(ii) the depository institution in default; or

(B) disaffirm or repudiate none of the qualified financial contracts referred to in subparagraph (A) (with respect to such person or any affiliate of such person).

(12) Certain security interests not avoidable

No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

(13) Authority to enforce contracts

(A) In general

The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of or the exercise of rights or powers by a conservator or receiver.

(B) Certain rights not affected

No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a director's or officer's liability insurance contract or depository

institution bond under other applicable law.

(14) Exception for Federal Reserve and Federal home loan banks

No provision of this subsection shall apply with respect to—

(A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(B) any security interest in the assets of the institution securing any such extension of credit.

(15) Selling credit card accounts receivable

(A) Notification required

An undercapitalized insured depository institution (as defined in section 1831o of this title) shall notify the Corporation in writing before entering into an agreement to sell credit card accounts receivable.

(B) Waiver by Corporation

The Corporation may at any time, in its sole discretion and upon such terms as it may prescribe, waive its right to repudiate an agreement to sell credit card accounts receivable if the Corporation—

(i) determines that the waiver is in the best interests of the deposit insurance fund; and

(ii) provides a written waiver to the selling institution.

(C) Effect of waiver on successors

(i) In general If, under subparagraph (B), the Corporation has waived its right to repudiate an agreement to sell credit card accounts receivable—

(I) any provision of the agreement that restricts solicitation of a credit card customer of the selling institution, or the use of a credit card customer list of the institution, shall bind any receiver or conservator of the institution; and

(II) the Corporation shall require any acquirer of the selling institution, or of substantially all of the selling

institution's assets or liabilities, to agree to be bound by a provision described in subclause (I) as if the acquirer were the selling institution.

(ii) Exception Clause (i)(II) does not—

(I) restrict the acquirer's authority to offer any product or service to any person identified without using a list of the selling institution's customers in violation of the agreement;

(II) require the acquirer to restrict any preexisting relationship between the acquirer and a customer; or

(III) apply to any transaction in which the acquirer acquires only insured deposits.

(D) Waiver not actionable

The Corporation shall not, in any capacity, be liable to any person for damages resulting from the waiver of or failure to waive the Corporation's right under this section to repudiate any contract or lease, including an agreement to sell credit card accounts receivable. No court shall issue any order affecting any such waiver or failure to waive.

(E) Other authority not affected

This paragraph does not limit any other authority of the Corporation to waive the Corporation's right to repudiate an agreement or lease under this section.

(16) Certain credit card customer lists protected

(A) In general

If any insured depository institution sells credit card accounts receivable under an agreement negotiated at arm's length that provides for the sale of the institution's credit card customer list, the Corporation shall prohibit any party to a transaction with respect to the institution under this section or section 1823 of this title from using the list, except as permitted under the agreement.

(B) Fraudulent transactions excluded

Subparagraph (A) does not limit the Corporation's authority to repudiate any agreement entered into with the intent to hinder, delay, or defraud the institution, the institution's creditors, or the Corporation.

(17) Savings clause

The meanings of terms used in this subsection are applicable for purposes of this subsection only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any similar terms under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000 [7 U.S.C. 27 to 27f], the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 U.S.C. 78c (a)(47)]), and the Commodity Exchange Act [7 U.S.C. 1 et seq.].

(h) Conditions applicable to resolution proceedings

(1) Consideration of local economic impact required

The Corporation shall fully consider the adverse economic impact on local communities, including businesses and farms, of actions to be taken by it during the administration and liquidation of loans of a depository institution in default.

(2) Actions to alleviate adverse economic impact to be considered

The actions which the Corporation shall consider include the release of proceeds from the sale of products and services for family living and business expenses and shortening the undue length of the decisionmaking process for the acceptance of offers of settlement contingent upon third party financing.

(3) Guidelines required

The Corporation shall adopt and publish procedures and guidelines to minimize adverse economic effects caused by its actions on individual debtors in the

community.

(4) Financial services industry impact analysis

After the appointment of the Corporation as conservator or receiver for any insured depository institution and before taking any action under this section or section 1823 of this title in connection with the resolution of such institution, the Corporation shall—

(A) evaluate the likely impact of the means of resolution, and any action which the Corporation may take in connection with such resolution, on the viability of other insured depository institutions in the same community; and

(B) take such evaluation into account in determining the means for resolving the institution and establishing the terms and conditions for any such action.

(i) Valuation of claims in default

(1) In general

Notwithstanding any other provision of Federal law or the law of any State and regardless of the method which the Corporation determines to utilize with respect to an insured depository institution in default or in danger of default, including transactions authorized under subsection (n) of this section and section 1823 (c) of this title, this subsection shall govern the rights of the creditors (other than insured depositors) of such institution.

(2) Maximum liability

The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution without exercising the Corporation's

authority under subsection (n) of this section or section 1823 of this title.

(3) Additional payments authorized

(A) In general

The Corporation may, in its discretion and in the interests of minimizing its losses, use its own resources to make additional payments or credit additional amounts to or with respect to or for the account of any claimant or category of claimants. Notwithstanding any other provision of Federal or State law, or the constitution of any State, the Corporation shall not be obligated, as a result of having made any such payment or credited any such amount to or with respect to or for the account of any claimant or category of claimants, to make payments to any other claimant or category of claimants.

(B) Source of funds

If the depository institution in default is a Bank Insurance Fund member, the Corporation may only make such payments out of funds held in the Bank Insurance Fund. If the depository institution in default is a Savings Association Insurance Fund member, the Corporation may only make such payments out of funds held in the Savings Association Insurance Fund.

(C) Manner of payment

The Corporation may make the payments or credit the amounts specified in subparagraphs (A) and (B) directly to the claimants or may make such payments or credit such amounts to an open insured depository institution to induce such institution to accept liability for such claims.

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect

the exercise of powers or functions of the Corporation as a conservator or a receiver.

(n) Bridge banks

(1) Organization

(A) Purpose

When 1 or more insured banks are in default, or when the Corporation anticipates that 1 or more insured banks may become in default, the Corporation may, in its discretion, organize, and the Office of the Comptroller of the Currency shall charter, 1 or more national banks with respect thereto with the powers and attributes of national banking associations, subject to the provisions of this subsection, to be referred to as bridge banks.

(B) Authorities

Upon the granting of a charter to a bridge bank, the bridge bank may—

(i) assume such deposits of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate, except that if any insured deposits of a bank are assumed, all insured deposits of that bank shall be assumed by the bridge bank or another insured depository institution;

(ii) assume such other liabilities (including liabilities associated with any trust business) of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate;

(iii) purchase such assets (including assets associated with any trust business) of such insured bank or banks that is or are in default or in danger of default as the Corporation may, in its discretion, determine to be appropriate; and

(iv) perform any other temporary function which the

Corporation may, in its discretion, prescribe in accordance with this chapter.

(C) Articles of association

The articles of association and organization certificate of a bridge bank as approved by the Corporation shall be executed by 3 representatives designated by the Corporation.

(D) Interim directors

A bridge bank shall have an interim board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) National bank

A bridge bank shall be organized as a national bank.

(2) Chartering

(A) Conditions

A national bank may be chartered by the Comptroller of the Currency as a bridge bank only if the Board of Directors determines that—

(i) the amount which is reasonably necessary to operate such bridge bank will not exceed the amount which is reasonably necessary to save the cost of liquidating, including paying the insured accounts of, 1 or more insured banks in default or in danger of default with respect to which the bridge bank is chartered;

(ii) the continued operation of such insured bank or banks in default or in danger of default with respect to which the bridge bank is chartered is essential to provide adequate banking services in the community where each such bank in default or in danger of default is located; or

(iii) the continued operation of such insured bank or banks in default or in danger of default with respect to which the bridge bank is chartered is in the best interest of the depositors of such bank or banks in default or in danger of default or the public.

(B) Insured national bank

A bridge bank shall be an insured bank from the time it is chartered as a national bank.

(C) Bridge bank treated as being in default for certain purposes

A bridge bank shall be treated as an insured bank in default at such times and for such purposes as the Corporation may, in its discretion, determine.

(D) Management

A bridge bank, upon the granting of its charter, shall be under the management of a board of directors consisting of not fewer than 5 nor more than 10 members appointed by the Corporation.

(E) Bylaws

The board of directors of a bridge bank shall adopt such bylaws as may be approved by the Corporation.

(3) Transfer of assets and liabilities

(A) In general

(i) Transfer upon grant of charter Upon the granting of a charter to a bridge bank pursuant to this subsection, the Corporation, as receiver, or any other receiver appointed with respect to any insured bank in default with respect to which the bridge bank is chartered may transfer any assets and liabilities of such bank in default to the bridge bank in accordance with paragraph (1).

(ii) Subsequent transfers At any time after a charter is granted to a bridge bank, the Corporation, as receiver, or any other receiver appointed with respect to an insured bank in default may transfer any assets and liabilities of such insured bank in default as the Corporation may, in its discretion, determine to be appropriate in accordance with paragraph (1).

(iii) Treatment of trust business For purposes of this paragraph, the trust business, including fiduciary

appointments, of any insured bank in default is included among its assets and liabilities.

(iv) Effective without approval The transfer of any assets or liabilities, including those associated with any trust business, of an insured bank in default transferred to a bridge bank shall be effective without any further approval under Federal or State law, assignment, or consent with respect thereto.

(B) Intent of Congress regarding continuing operations

It is the intent of the Congress that, in order to prevent unnecessary hardship or losses to the customers of any insured bank in default with respect to which a bridge bank is chartered, especially creditworthy farmers, small businesses, and households, the Corporation should—

(i) continue to honor commitments made by the bank in default to creditworthy customers, and

(ii) not interrupt or terminate adequately secured loans which are transferred under subparagraph (A) and are being repaid by the debtor in accordance with the terms of the loan instrument.

(4) Powers of bridge banks

Each bridge bank chartered under this subsection shall have all corporate powers of, and be subject to the same provisions of law as, a national bank, except that—

(A) the Corporation may—

(i) remove the interim directors and directors of a bridge bank;

(ii) fix the compensation of members of the interim board of directors and the board of directors and senior management, as determined by the Corporation in its discretion, of a bridge bank; and

(iii) waive any requirement established under section 71, 72, 73, 74, or 75 of this title (relating to directors of

national banks) or section 71a of this title which would otherwise be applicable with respect to directors of a bridge bank by operation of paragraph (2)(B);

(B) the Corporation may indemnify the representatives for purposes of paragraph (1)(B) and the interim directors, directors, officers, employees, and agents of a bridge bank on such terms as the Corporation determines to be appropriate;

(C) no requirement under section 51 [2] of this title or any other provision of law relating to the capital of a national bank shall apply with respect to a bridge bank;

(D) the Comptroller of the Currency may establish a limitation on the extent to which any person may become indebted to a bridge bank without regard to the amount of the bridge bank's capital or surplus;

(E)

(i) the board of directors of a bridge bank shall elect a chairperson who may also serve in the position of chief executive officer, except that such person shall not serve either as chairperson or as chief executive officer without the prior approval of the Corporation; and

(ii) the board of directors of a bridge bank may appoint a chief executive officer who is not also the chairperson, except that such person shall not serve as chief executive officer without the prior approval of the Corporation;

(F) a bridge bank shall not be required to purchase stock of any Federal Reserve bank;

(G) the Comptroller of the Currency shall waive any requirement for a fidelity bond with respect to a bridge bank at the request of the Corporation;

(H) any judicial action to which a bridge bank becomes a party by virtue of its acquisition of any assets or assumption of any liabilities of a bank in default shall be stayed from further proceedings for a period of up to 45

days at the request of the bridge bank;

(I) no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement—

(i) is in writing,

(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,

(iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured bank in default;

(J) notwithstanding section 1823 (e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such depository institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (I); and

(K) except with the prior approval of the Corporation, a bridge bank may not, in any transaction or series of transactions, issue capital stock or be a party to any merger, consolidation, disposition of assets or liabilities, sale or exchange of capital stock, or similar transaction, or change its charter.

(5) Capital

(A) No capital required

The Corporation shall not be required to—

(i) issue any capital stock on behalf of a bridge bank chartered under this subsection; or

(ii) purchase any capital stock of a bridge bank, except that notwithstanding any other provision of Federal or State law, the Corporation may purchase and retain capital stock of a bridge bank in such amounts and on such terms as the Corporation, in its discretion, determines to be appropriate.

(B) Operating funds in lieu of capital

Upon the organization of a bridge bank, and thereafter, as the Board of Directors may, in its discretion, determine to be necessary or advisable, the Corporation may make available to the bridge bank, upon such terms and conditions and in such form and amounts as the Corporation may in its discretion determine, funds for the operation of the bridge bank in lieu of capital.

(C) Authority to issue capital stock

Whenever the Board of Directors determines it is advisable to do so, the Corporation shall cause capital stock of a bridge bank to be issued and offered for sale in such amounts and on such terms and conditions as the Corporation may, in its discretion, determine.

(6) No Federal status

(A) Agency status

A bridge bank is not an agency, establishment, or instrumentality of the United States.

(B) Employee status

Representatives for purposes of paragraph (1)(B), interim directors, directors, officers, employees, or agents of a bridge bank are not, solely by virtue of service in any such capacity, officers or employees of the United States. Any employee of the Corporation or of any Federal instrumentality who serves at the request of the Corporation as a representative for

purposes of paragraph (1)(B), interim director, director, officer, employee, or agent of a bridge bank shall not—

(i) solely by virtue of service in any such capacity lose any existing status as an officer or employee of the United States for purposes of title 5 or any other provision of law, or

(ii) receive any salary or benefits for service in any such capacity with respect to a bridge bank in addition to such salary or benefits as are obtained through employment with the Corporation or such Federal instrumentality.

(7) Assistance authorized

The Corporation may, in its discretion, provide assistance under section 1823 (c) of this title to facilitate any transaction described in clause (i), (ii), or (iii) of paragraph (10)(A) with respect to any bridge bank in the same manner and to the same extent as such assistance may be provided under such section with respect to an insured bank in default, or to facilitate a bridge bank's acquisition of any assets or the assumption of any liabilities of an insured bank in default.

(8) Acquisition

(A) In general

The responsible agency shall notify the Attorney General of any transaction involving the merger or sale of a bridge bank requiring approval under section 1828 (c) of this title and if a report on competitive factors is requested within 10 days, such transaction may not be consummated before the 5th calendar day after the date of approval by the responsible agency with respect thereto. If the responsible agency has found that it must act immediately to prevent the probable failure of 1 of the banks involved, the preceding sentence does not apply and the transaction may be consummated

immediately upon approval by the agency.

(B) By out-of-State holding company

Any depository institution, including an out-of-State depository institution, or any out-of-State depository institution holding company may acquire and retain the capital stock or assets of, or otherwise acquire and retain a bridge bank if the bridge bank at any time had assets aggregating $500,000,000 or more, as determined by the Corporation on the basis of the bridge bank's reports of condition or on the basis of the last available reports of condition of any insured bank in default, which institution has been acquired, or whose assets have been acquired, by the bridge bank. The acquiring entity may acquire the bridge bank only in the same manner and to the same extent as such entity may acquire an insured bank in default under section 1823 (f)(2) of this title.

(9) Duration of bridge bank

Subject to paragraphs (11) and (12), the status of a bridge bank as such shall terminate at the end of the 2-year period following the date it was granted a charter. The Board of Directors may, in its discretion, extend the status of the bridge bank as such for 3 additional 1-year periods.

(10) Termination of bridge bank status

The status of any bridge bank as such shall terminate upon the earliest of—

(A) the merger or consolidation of the bridge bank with a depository institution that is not a bridge bank;

(B) at the election of the Corporation, the sale of a majority of the capital stock of the bridge bank to an entity other than the Corporation and other than another bridge bank;

(C) the sale of 80 percent, or more, of the capital stock of the bridge bank to an entity other than the

Corporation and other than another bridge bank;

(D) at the election of the Corporation, either the assumption of all or substantially all of the deposits and other liabilities of the bridge bank by a depository institution holding company or a depository institution that is not a bridge bank, or the acquisition of all or substantially all of the assets of the bridge bank by a depository institution holding company, a depository institution that is not a bridge bank, or other entity as permitted under applicable law; and

(E) the expiration of the period provided in paragraph (9), or the earlier dissolution of the bridge bank as provided in paragraph (12).

(11) Effect of termination events

(A) Merger or consolidation

A bridge bank that participates in a merger or consolidation as provided in paragraph (10)(A) shall be for all purposes a national bank with all the rights, powers, and privileges thereof, and such merger or consolidation shall be conducted in accordance with, and shall have the effect provided in, the provisions of applicable law.

(B) Charter conversion

Following the sale of a majority of the capital stock of the bridge bank as provided in paragraph (10)(B), the Corporation may amend the charter of the bridge bank to reflect the termination of the status of the bridge bank as such, whereupon the bank shall remain a national bank, with all of the rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(C) Sale of stock

Following the sale of 80 percent or more of the capital stock of a bridge bank as provided in paragraph (10)(C), the bank shall remain a national bank, with all of the

rights, powers, and privileges thereof, subject to all laws and regulations applicable thereto.

(D) Assumption of liabilities and sale of assets

Following the assumption of all or substantially all of the liabilities of the bridge bank, or the sale of all or substantially all of the assets of the bridge bank, as provided in paragraph (10)(D), at the election of the Corporation the bridge bank may retain its status as such for the period provided in paragraph (9).

(E) Effect on holding companies

A depository institution holding company acquiring a bridge bank under section 1823 (f) of this title, paragraph (8)(B) (or any predecessor provision), or both provisions, shall not be impaired or adversely affected by the termination of the status of a bridge bank as a result of subparagraph (A), (B), (C), or (D) of paragraph (10), and shall be entitled to the rights and privileges provided in section 1823 (f) of this title.

(F) Amendments to charter

Following the consummation of a transaction described in subparagraph (A), (B), (C), or (D) of paragraph (10), the charter of the resulting institution shall be amended to reflect the termination of bridge bank status, if appropriate.

(12) Dissolution of bridge bank

(A) In general

Notwithstanding any other provision of State or Federal law, if the bridge bank's status as such has not previously been terminated by the occurrence of an event specified in subparagraph (A), (B), (C), or (D) of paragraph (10)—

(i) the Board of Directors may, in its discretion, dissolve a bridge bank in accordance with this paragraph at any time; and

(ii) the Board of Directors shall promptly commence

dissolution proceedings in accordance with this paragraph upon the expiration of the 2-year period following the date the bridge bank was chartered, or any extension thereof, as provided in paragraph (9).

(B) Procedures

The Comptroller of the Currency shall appoint the Corporation receiver for a bridge bank upon certification by the Board of Directors to the Comptroller of the Currency of its determination to dissolve the bridge bank. The Corporation as such receiver shall wind up the affairs of the bridge bank in conformity with the provisions of law relating to the liquidation of closed national banks. With respect to any such bridge bank, the Corporation as such receiver shall have all the rights, powers, and privileges and shall perform the duties related to the exercise of such rights, powers, or privileges granted by law to a receiver of any insured depository institution and notwithstanding any other provision of law in the exercise of such rights, powers, and privileges the Corporation shall not be subject to the direction or supervision of any State agency or other Federal agency.

(13) Multiple bridge banks

Subject to paragraph (1)(B)(i), the Corporation may, in the Corporation's discretion, organize 2 or more bridge banks under this subsection to assume any deposits of, assume any other liabilities of, and purchase any assets of a single bank in default.

12 § 1823. Corporation monies

(e) Agreements against interests of Corporation

(1) In general

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

(2) Exemptions from contemporaneous execution requirement

An agreement to provide for the lawful collateralization of—

(A) deposits of, or other credit extension by, a Federal, State, or local governmental entity, or of any depositor referred to in section 1821 (a)(2) of this title, including an agreement to provide collateral in lieu of a surety bond;

(B) bankruptcy estate funds pursuant to section 345 (b)(2) of title 11;

(C) extensions of credit, including any overdraft, from a Federal reserve bank or Federal home loan bank; or

(D) one or more qualified financial contracts, as defined in section 1821 (e)(8)(D) of this title,

shall not be deemed invalid pursuant to paragraph (1)(B) solely because such agreement was not executed

contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of the collateral made in accordance with such agreement.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12 § 1821(h) Conditions applicable to resolution proceedings

(1) Consideration of local economic impact required
The Corporation shall fully consider the adverse economic impact on local communities, including businesses and farms, of actions to be taken by it during the administration and liquidation of loans of a depository institution in default.
(2) Actions to alleviate adverse economic impact to be considered
The actions which the Corporation shall consider include the release of proceeds from the sale of products and services for family living and business expenses and shortening the undue length of the decisionmaking process for the acceptance of offers of settlement contingent upon third party financing.
(3) Guidelines required

The Corporation shall adopt and publish procedures and guidelines to minimize adverse economic effects caused by its actions on individual debtors in the community.

(4) Financial services industry impact analysis

After the appointment of the Corporation as conservator or receiver for any insured depository institution and before taking any action under this section or section 1823 of this title in connection with the resolution of such institution, the Corporation shall—

(A) evaluate the likely impact of the means of resolution, and any action which the Corporation may take in connection with such resolution, on the viability of other insured depository institutions in the same community; and

(B) take such evaluation into account in determining the means for resolving the institution and establishing the terms and conditions for any such action.